No. 73-5677

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

MAURICE SCHICK, Petitioner,

v.

GEORGE J. REED, WILLIAM E. AMOS,
CURTIS C. CRAWFORD, WALTER DUNBAR, and
GERALD E. MURCH, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

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October 31, 1973

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE.	3
REASONS FOR GRANTING THE WRIT	7
I	7
II	13
CONCLUSION	20
APPENDIX	
President's Commutation Action	21
Opinion of the Army board of review	22
Opinion of the Court of Military Appeals	26
Opinion of the Army board of review on reconsideration	28
Opinion of the Court of Military Appeals	33
Opinion of the Court of Appeals	41
Order Denying Petition for Rehearing	58

TABLE OF AUTHORITIES

CASES

Anderson v. State, 267 So.2d 8, ___Fla. ___.(1972). 7, 8

Application of White, 2 N.Y.S.2d 582, 166 Misc. 481 (1938) 14

Bates v. Wilkinson, 267 F.2d 779 (5th Cir. 1959) 9

Biddle v. Perovich, 274 U.S. 480 (1927).13, 14, 15, 16, 18

Bishop v. United States, 223 F.2d 582 (D.C. Cir. 1955) 17

Page

Burgett v. Texas, 389 U.S. 109 (1967). 10

Commonwealth v. Bradley, 449 Pa. 19, 295 A.2d 842 (1972). 8

Ex parte Grossman, 267 U.S. 87 (1925). 18

Ex parte Weathers, 33 F.2d 294 (S.D. Fla. 1929). . 17

Ex parte Webbe, 332 Mo. 859, 30 S.W. 2d 612 (1929). 14

Ex parte Wells, 59 U.S. (18 How.) 307 (1855) 11, 14,16, 17, 18

Furman v. Georgia, 408 U.S. 238 (1972). 2, 6, 7, 11, 12

Garcia v. State, 501 P.2d 1128 (Okla. Cr. 1972). . 8

Gideon v. Wainwright, 372 U.S. 335 (1963). . . . 10, 11

Graham v. State, ___ Ark. ___, 486 S.W.2d 678 (1972). 8

Huggins v. Commonwealth, 213 Va. 327, 191 S.E.2d 734 (1972). 7

Illinois v. Bosworth, 133 U.S. 92 (1890) 14

In re Conditional Discharge of Convicts, 73 Vt. 414, 51 A. 10 (1901). 14

Jones v. Looney, 107 F. Supp. 624 (E.D. Mich. 1952). 9

Kavalin v. White, 44 F.2d 49 (10th Cir. 1930). . 14, 17

Kitchens v. Smith, 401 U.S. 847 (1971) 10

Loper v. Beto, 405 U.S. 473 (1972) 10

Lupo v. Zerbst, 92 F.2d 362 (5th Cir. 1937), cert. denied, 303 U.S. 646 (1938). 14

Marks v. Louisiana, 408 U.S. 933 (1972) 7

McKnight v. Hunter, 98 F. Supp. 605 (D. Kans. 1951). 9

O'Callahan v. Attorney General, 230 F. Supp. 766, aff'd 338 F.2d 989 (1st Cir. 1965), cert. denied, 381 U.S. 926 (1964). 9

People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880 (1972) 8

Page

People v. Speck, 52 Ill.2d 284, 287 N.E.2d 699 (1972). 7

Pickelsimer v. Wainwright, 375 U.S. 2 (1963) . . . 10

Robinson v. Neil, 409 U.S. 505 (1973). 7

Schwab v. Berggren, 143 U.S. 442 (1892). 14

Semmes v. United States, 91 U.S. 21 (1875) 18

State v. Baker, 81 Wash. 2d 281, 501 P.2d 284 (1972). 11

State v. District Court, 73 Mont. 541, 237 P. 525 (1925). 14

State v. Johnson, 31 Ohio St.2d 106, 285 N.E.2d 751 (1972). 8

State v. Peters, 43 Ohio St. 629, 4 N.E. 81 (1885) 14

State v. Square, 263 La. 291, 268 So.2d 229 (1972) 8

State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973) 8

Stewart v. Massachusetts, 408 U.S. 845 (1972). . . 7

Stroud v. Johnson, 139 F.2d 171 (9th Cir. 1943), cert. denied, 321 U.S. 796 (1944). 17

Sullivan v. State, 229 Ga. 751, 194 S.E.2d 410 (1972). 7

United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) 18

United States v. Six Lots of Ground, 27 Fed.Cas. 1097 (1872). 14

United States v. Tucker, 404 U.S. 443 (1972) . . . 10

United States v. Wilson, 32 U.S. (7 Pet.) 94 (1833) 14, 17, 18

Vitale v. Hunter, 206 F.2d 826 (10th Cir. 1953) . 17

Walker v. Georgia, 408 U.S. 936 (1972) 7

Whittington v. Stevens, 221 Miss. 598 73 So.2d 137 (1954). 14

Page

CONSTITUTION AND STATUTES

Constitution of the United States:

Article II, Section 2 . . . . . 2, 3, 13, 14
Eighth Amendment. 3, 6

10 U.S.C. §§ 857, 858. 12

10 U.S.C. § 871 . . . . . 5, 12

10 U.S.C. § 918 . . . . . 3, 9

10 U.S.C. §§ 952, 953. 9

18 U.S.C. §§ 4202, 4203 . . . . . 5, 9

28 U.S.C. § 1254(1). 2

MISCELLANEOUS

59 Am. Jur.2d §§ 3, 7, 8 14

Black's Law Dictionary (4th ed. 1968) 14

Exec. Order No. 11476, 34 Fed. Reg. 10502 (1969) 9, 11, 12

Headquarters, Department of the Army, Army Regulation 190-26 (1972). 9

Humbert, The Pardoning Power of the President (1941) 13, 14

Manual for Courts-Martial, 1969 (Revised edition). 9, 11, 12

Moyer, Justice and the Military (1972) 12

41 Op. Atty. Gen. 251 (1955) 14, 17

Rules of the United States Board of Parole (1965) 5

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner, Maurice Schick, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The opinion of the Army board of review was not reported. The opinion of the Court of Military Appeals remanding the case to the board of review for reconsideration of the accused's sanity is reported at 6 U.S.C.M.A. 209. The opinion of the board of review on reconsideration is reported at 21 C.M.R. 343. The subsequent opinion of the Court of Military Appeals is reported at 7 U.S.C.M.A. 419. All four opinions are reprinted in the appendix to this petition beginning at page 22.

The United States District Court for the District of Columbia rendered no opinion. The opinion of the United States Court of Appeals for the District of Columbia, which affirmed the District Court's order granting the defendant's Motion for Summary Judgment, is reported at _____F.2d____ (D.C. Cir. 1973) and is reprinted in the appendix to this petition beginning at page 41.

JURISDICTION

The opinion of the Court of Appeals, which constitutes its judgment, was rendered on July 23, 1973. A timely petition for rehearing was denied on October 1, 1973, by an order which appears in the appendix to this petition at page 58. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the no-parole condition on the commutation of petitioner's death sentence is lawful where the underlying death sentence itself is retroactively illegal under Furman v. Georgia, 408 U.S. 238 (1972), and its progeny.

2. Whether the President, acting under his constitutional power to "grant reprieves and pardons," may lawfully commute a sentence to punishment that is not authorized by law.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Article II, Section 2 power of the President "to grant reprieves and pardons for offenses

against the United States . . ." and the Eighth Amendment prohibition against the imposition of "cruel and unusual punishments."

STATEMENT OF THE CASE

Petitioner, Maurice Schick, a Master Sergeant in the United States Army, was tried by general court-martial in 1954 for the murder of the young daughter of a senior Army officer. The only contested issue at trial was the sanity of the accused. Two civilian Japanese psychiatrists -- one from the Department of Neuro-Psychiatry of Tokyo University Medical School, the other the Superintendent of Tokyo Metropolitan Matsuzawa Mental Hospital -- examined the accused and found that he was psychotic, either epileptic or schizophrenic, and that he was unable to distinguish right from wrong or to adhere to the right. Four Army psychiatrists, however, testified for the prosecution that the accused was suffering from a non-psychotic behavior disorder and that he could adhere to the right and possessed the mental capacity to stand trial. Relying on this latter testimony, the Army court-martial rejected the accused's defense of insanity, convicted him of premeditated murder under Article 118 of the Uniform Code of Military Justice (10 U.S.C. § 918), and sentenced him to death.

On review, an Army board of review affirmed the conviction and sentence in an unpublished opinion. In support of its conclusion, the board cited a Surgeon General's opinion, based on a review of the record, that the accused possessed both mental responsibility at the

time of the offense and mental capacity at the time of trial. The case was then forwarded for further review to the civilian Court of Military Appeals which granted a continuance prior to argument to allow further civilian psychiatric examination. The accused was examined by psychiatrists and psychologists at the Menninger Clinic, including Dr. Menninger himself, who submitted to the court a report stating that in their opinion the accused was "unable to adhere to the right with regard to the offenses charged at the time he committed the crime." Presented with this new report, the Court of Military Appeals remanded the case to the board of review for reconsideration of the sanity issue.

Also presented as other new evidence to the board of review were a report by Dr. Winfred Overholser, Superintendent, St. Elizabeth's Hospital, Washington, D.C., and a second opinion by the Surgeon General. Dr. Overholser's opinion was that without doubt the accused was unable at the time of the offense to adhere to the right or to formulate the requisite premeditation and "'that Schick is entitled to a verdict of acquittal by reason of insanity.'" The Surgeon General stated in his second report that despite the Menninger report he adhered to his original opinion.

Upon reconsideration, the Army board of review, after considering the Menninger Clinic opinion, the Overholser opinion, the Surgeon General's second report, and the evidence of record, again affirmed the findings and

sentence. The Court of Military Appeals, empowered to consider only questions of law, affirmed by a 2-1 decision. As required by statute, the case was then forwarded to the President for final review. 18 U.S.C. § 871(a).

In 1960, six years after Schick had been sentenced to death, President Eisenhower, exercising his authority under Article II, Section 2 of the Constitution, commuted Schick's death sentence to "confinement at hard labor for the term of his natural life," with the express condition that Schick never be eligible for consideration for parole. Then, as required by statute (10 U.S.C. § 871(a)), the President ordered the sentence, as modified, executed and directed that Petitioner be committed to the custody of the Attorney General. (The President's action is set forth in the appendix to this petition at page 21.) Petitioner was accordingly dishonorably discharged from the Army and transferred to the federal penitentiary at Lewisburg, Pennsylvania.

Petitioner has now been incarcerated for more than 15 years. Under applicable statutes (18 U.S.C. § 4202-03) and Regulations (Rules of the United States Board of Parole effective July 1, 1965, at 8-11), Petitioner would have become eligible to be considered for parole in March, 1969, but for the no-parole condition in President Eisenhower's "commutation" action of March 25, 1960.

In 1971, Petitioner sought a declaratory judgment in United States District Court to require the

chairman and members of the United States Parole Board to consider him for parole. At a hearing on November 5, 1971, the United States District Court for the District of Columbia (per Hart, J.) dismissed the case for lack of subject matter jurisdiction. The Court of Appeals summarily reversed and remanded the case to the District Court for further action. On March 24, 1972, the District Court granted the Board of Parole's Motion for Summary Judgment "on both constitutional and military justice grounds . . .." The Court of Appeals, by split decision, affirmed the District Court. ____F.2d___ (D.C. Cir. 1973). A majority of the court held that the retroactivity of Furman v. Georgia, 408 U.S. 238 (1972), is irrelevant to Petitioner on the grounds that when Furman was decided Petitioner was "not under a death sentence." ___F.2d at ___. The Court also concluded that the President's action was not otherwise unlawful and that the condition imposed did not constitute cruel and unusual punishment. In dissent, Judge Wright expressed the view that the retrospective application of Furman requires that the death sentence imposed by court-martial be vacated and replaced by the only other sentence which could lawfully have been imposed, life imprisonment with the possibility of parole. A Petition for Rehearing and Suggestion for Rehearing En Banc filed on August 21, 1973, was denied October 1, 1973.

Petitioner does not ask to be released from confinement. Judgment in his favor would entitle him only to the right to be considered for parole.

REASONS FOR GRANTING THE WRIT

I.

The first question presented raises a fundamental issue regarding the effect and implementation of Furman v. Georgia, 408 U.S. 238 (1972). The decision by the divided court below directly undercuts this Court's rulings that Furman shall be applied retrospectively and is inconsistent with prior holdings on the retroactivity of constitutional decisions.

By per curiam decision, this Court in Furman v. Georgia, invalidated the "imposition and carrying out" of discretionary death sentences. 408 U.S. at 239. This decision has been accorded fully retroactive effect. Robinson v. Neil,409 U.S. 505, 508 (1973); Stewart v. Massachusetts,408 U.S. 845 (1972); Marks v. Louisiana,408 U.S. 933 (1972); Walker v. Georgia, 408 U.S. 936 (1972).

Following these decisions, lower courts have hold that prisoners sentenced to death must have their sentences vacated and judgments modified to provide for alternative sentences provided by statute. The action of lower courts has ensured that such prisoners be treated as though the death sentence had never been imposed. Cases in which the trial court could have imposed more than one sentence other than death have been remanded for resentencing.[1/] Where, as in the instant case, only one

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1/ E.g., Huggins v. Commonwealth, 213 Va. 327, 191 S.E.2d 734, 736 (1972); People v. Speck, 52 Ill.2d 284, 287 N.E.2d 699 (1972); Anderson v. State, ___Fla.___, 267 So.2d 8, 10 (1972). Cf. Sullivan v. State, 229 Ga. 751, 194 S.E.2d 410 (1972).

alternative punishment was available to the trial court, that punishment has been automatically imposed.[2/] In some cases the appellate court itself imposed the lesser punishment.[3/] In others, appellate courts have remanded with directions that the trial court impose the alternate punishment.[4/]

In this case a majority of the District of Columbia Court of Appeals held that Furman, effective retroactively, has no effect on the no-parole condition of petitioner's commuted death sentence, even though such a condition could not have been imposed had not the death sentence been assessed against the petitioner. The court reasoned that no action was required because at the time Furman was decided petitioner was not "under a death sentence." ___F.2d at ___. This conclusion is inconsistent with this Court's holdings in Furman and its progeny, conflicts with the decisions of other lower courts which have treated past impositions of the death sentence as nullities, and disregards existing case law on the retroactivity of constitutional holdings.

2/ State v. Johnson, 31 Ohio St.2d 106, 285 N.E.2d 751 (1972); Capler v. State, ___Miss.___, 268 So.2d 338 (1972); State v. Square, 263 La. 291, 268 So.2d 229 (1972); Garcia v. State, 501 P.2d 1128 (Okla. Cr. 1972); Commonwealth v. Bradley, 449 Pa. 19, 295 A.2d 842 (1972); State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973); Graham v. State, ___Ark.___, 486 S.W.2d 678 (1972); Anderson v. State, supra. See also People v. Anderson, 6 Cal.3d 628, 657 n. 45, 493 P.2d 880, 899-900 n. 45 (1972).

3/ E.g., State v. Johnson, supra; Commonwealth v. Bradley, supra; Anderson v. State, supra.

4/ E.g., Capler v. State, supra; State v. Square, supra; Garcia v. State, supra; Graham v. State, supra; State v. Waddell, supra.

It is incontestable that the no-parole condition could not now exist if the court-martial that originally tried Schick had not imposed the death penalty. Article 118 of the Uniform Code of Military Justice authorizes only two sentences for a conviction of premeditated murder: death or life imprisonment. 10 U.S.C. § 918. Had petitioner been sentenced to life imprisonment, he would now be eligible for parole under the same standards as all other federal prisoners. 18 U.S.C. §§ 4202-03 (1970).[5/] Confinement without opportunity for parole is unknown to military law: it is not authorized punishment for any offense under the UCMJ and may not be imposed by military reviewing authorities acting to commute a sentence. Para. 88c, Manual For Courts-Martial, 1969 (Revised edition), Exec. Order No. 11476, 34 Fed. Reg. 10502 (1969) (hereinafter cited as MCM, 1969 (Rev.)). In short, the no-parole condition of the commutation stems solely from the court-martial's imposition of the death sentence; but for the imposition of that sentence it could not now exist.

5/ Military prisoners may be confined in military confinement facilities (United States Disciplinary Barracks in the case of Army prisoners) or, as was Schick, transferred to a federal penitentiary. Military prisoners incarcerated in federal penitentiaries are governed by the same statutes and regulations applicable to all federal prisoners, 18 U.S.C. §§ 4202-03 (1970). See 10 U.S.C. § 858 (1970); Jones v. Looney, 107 F. Supp. 624 (E.D. Mich. 1952); McKnight v. Hunter, 98 F. Supp. 605 (D. Kans. 1951); Bates v. Wilkinson, 267 F.2d 779 (5th Cir. 1959); O'Callahan v. Attorney General, 230 F. Supp. 766, aff'd, 338 F.2d 989 (1st Cir. 1965), cert. denied, 381 U.S. 926 (1964). Had Schick been confined in the United States Disciplinary Barracks rather than federal prison, he would likewise now be eligible for parole under the appropriate statutes and regulations. 10 U.S.C. §§ 952-53 (1970); Headquarters, Department of the Army, Army Regulation 190-26, Ch. 1, para. 1-4(a)(2) (March 20, 1972).

Equally clear is that petitioner, who remains ineligible for parole, continues to suffer adverse effects of the imposition of the original death sentence, now declared to have been illegal.

Under precedents on retroactivity, both direct and indirect consequences of a violation of a criminal defendant's rights must be eradicated when a constitutional ruling is held to be retroactive. The implementation of Gideon v. Wainwright, 372 U.S. 335 (1963), holding that an indigent defendant in a state felony trial is constitutionally entitled to appointed counsel, provides several such examples. Holding Gideon to be retroactive, this Court eliminated the direct consequences of prior violations of Gideon standards by invalidating the convictions of prisoners serving sentences assessed at state felony trials at which they had not been represented by counsel. Pickelsimer v. Wainwright, 375 U.S. 2 (1963); Kitchens v. Smith, 401 U.S. 847 (1971). In addition, this Court granted relief from indirect adverse consequences suffered by persons who had already served their sentences. E.g., Burgett v. Texas, 389 U.S. 109 (1967) (conviction reversed where indictment reciting prior convictions invalid under Gideon was read to jury at beginning of trial); United States v. Tucker, 404 U.S. 443 (1972) (resentencing required where prosecutor impeached defendant by questioning him about three prior felony convictions, two of which were invalid under Gideon); Loper v. Beto, 405 U.S. 473 (1972) (conviction overturned where defendant was questioned about four previous convictions, all invalid under

Gideon). Thus, in giving Gideon retrospective effect, this Court has consistently sought to erase the indirect adverse consequences traceable to violations of the principles of that decision. Full retroactivity means nothing less.

At least one court has granted, in a case similar to this one, the relief that Petitioner seeks. In State v. Baker, 81 Wash.2d 281, 501 P.2d 284 (1972), defendant was found guilty of first-degree murder and the jury requested that the death penalty be imposed. The trial judge, however, deferred imposition of the death penalty on condition that the defendant be imprisoned for life with no possibility for parole, a sentence not authorized by statute. Considering the case on appeal in light of the intervening decision of Furman v. Georgia, the Supreme Court of Washington invalidated the deferral and the imposition of no-parole life imprisonment and remanded for resentencing.

It is, of course, untenable to suggest, as the court below did, that the death penalty was never "imposed" on Schick because the sentence had not been ordered executed. It was imposed not only in the technical sense but in practical effect as well. Had it not been imposed, it could not have been commuted. The provisions of military law regarding execution of sentences simply parallel civilian procedures under which execution is stayed pending appellate review.[6/] Indeed, the Manual for

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6/ The differences between the two stem primarily from the fact that appellate review in the military is automatic. The time at which a sentence may be ordered executed

(cont'd)

Courts-Martial, supra, repeatedly and explicitly states that a sentence is "imposed" when it is adjudged by the court-martial at trial. See, e.g., paras. 76a(2), (4), (5); 76b(1); 81d(1); 125; 126a, MCM, 1969 (Rev.). Paragraph 126, supra, deals specifically with limitations on the trial court's "imposition of the death penalty."

The effect of the lower court's ruling on petitioner -- who seeks not to be released, but only to be given the opportunity to be considered for parole -- is to penalize him uniquely. He is now in a worse position than all other prisoners upon whom death penalty had been imposed but not executed at the time Furman was decided. They now all come within the reach of applicable parole statutes. Had they, like Schick, been subjects of clemency in the form of commutation to no-parole life imprisonment, they would be in a worse position than they now are.

Allowing the decision below to stand would undermine the integrity of the judicial process by sanctioning a holding that fails to adhere to this Court's rulings in Furman v. Georgia and subsequent related cases. Although the no-parole condition found in this case was imposed by President Eisenhower in only six instances, resolution of the issue presented here would be significant precedent

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(cont'd)

varies with the nature and severity of the sentence, which under military law determine the number of levels of appellate review to which the accused is entitled. 10 U.S.C. §§ 857, 858, 871 (Art. 57, 58, 66, 67, 69, 71, UCMJ); para. 88, 98-103, 110, MCM, 1969 (Rev.). See generally Moyer, Justice and the Military §§ 2-673, 2-750 to 2-808 (1972).

for other cases raising the question of whether retrospective application of a constitutional ruling will extend to lasting, though indirect, consequences of prior violations of that rule.

II.

The second question involves construction of an important constitutional provision, the Article II, Section 2 clause that empowers the President to grant "reprieves and pardons." This provision is the source of the President's power to commute sentences, as well as his authority to grant amnesty and remissions. Biddle v. Perovich, 274 U.S. 480 (1927). The issue here involves the limitations of the power to commute. Although limitations were clearly implied by early decisions of this Court, some confusion has been evident in recent lower court decisions, and commentators have suggested that the limits are uncertain. E.g., Humbert, The Pardoning Power of the President 47 (1941).

The question is substantial not only because of the inherent importance of this constitutional provision, but because it has served as the model for parallel provisions in numerous State constitutions. Ex parte Wells, 59 U.S. 307, 313 (1855). Delineation of the limitations on the power to commute would be especially timely since an inevitable consequence of the enactment of mandatory death sentences that has followed in the wake of Furman will be to increase demands upon Chief Executives to exercise their clemency power.

Commutation is the substitution of a lesser, different type of punishment for the punishment actually imposed. Schwab v. Berggren, 143 U.S. 442, 451 (1892); Biddle v. Perovich, supra, at 487.[7/] Historically, the President's power to commute derived directly from his Article II, Section 2 power to grant pardons. Ex parte Wells, supra, at 313-15; Biddle v. Perovich, supra. This power and the derivative power to commute sentences are by general agreement understood not to be without limits. Courts have frequently stated that the Chief Executive may attach any condition to a pardon so long as it is not "illegal, immoral, or impossible of performance." E.g., United States v. Six Lots of Ground, 27 Fed. Cas. 1097, 1098 (1872); Kavalin v. White, 44 F.2d 49 (10th Cir. 1930); Lupo v. Zerbst, 92 F.2d 362 (5th Cir. 1937); Pardoning Power of the President, 41 Op. Atty. Gen. 251, 252 (1955).

7/ The concept of commutation as distinguished from pardon -- complete relief from the legal consequences of a conviction, including exemption from the punishment imposed -- is well-established in our jurisprudence. See Black's Law Dictionary 351, 1268-69 (4th ed. 1968); United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833); Osborne v. United States, 91 U.S. 474, 477 (1875); Illinois v. Bosworth, 133 U.S. 92, 104-05 (1890); Lupo v. Zerbst, 92 F.2d 362, 364 (5th Cir. 1937); In re Conditional Discharge of Convicts, 51 A. 10, 13, 14, 73 Vt. 414 (1901); Application of White, 2 N.Y.S.2d 582, 166 Misc. 481 (1938); State v. Peters, 4 N.E. 81, 87, 43 Ohio St. 629 (1885); Whittington v. Stevens, 73 So.2d 137, 139, 221 Miss. 598 (1954); Ex parte Webbe, 30 S.W.2d 612, 615, 332 Mo. 859 (1929); State v. District Court, 237 P. 525, 527, 73 Mont. 541 (1925); Humbert, The Pardoning Power of the President 27 (1941); 59 Am.Jur.2d §§ 3, 7, 8.

Without adopting this formulation, it is sufficient to note that none of these sources of authority addresses the crucial question of what types of commutations are "illegal." Presumably, it would be illegal and beyond a President's constitutional power to "commute" a sentence to keel-hauling or to a $10,000 fine to be paid to the President's political party or to lifetime confinement to a monastery. Short of unlikely hypotheticals, however, what the precise limits of the President's constitutional power to commute are has not been clearly established. That is the question presented by this case.

Given the legality of the President's power to commute under Biddle v. Perovich, supra, the limits of this power must be -- as this Court has previously implied -- that a President may commute only to a punishment provided by law. If a President chooses to commute rather than to pardon, he may not impose some form of punishment foreign to the system of criminal law under which the prisoner was tried.

The most direct support for these limits comes, quite simply, from the meaning of the words themselves. The word "commute" means the substitution of a different, lesser form of lawful punishment. In Biddle v. Perovich, supra, the Solicitor General himself made clear that "commutation" extends, by definition, only to the substitution of a punishment provided by law. In his argument before this Court he explicitly stated that "[a] commutation is the substitution of a milder punishment known to the law for the one inflicted by the court." Id. at 483 (emphasis

added). Whether the President has absolute discretion in commuting a sentence is therefore beside the point; that discretion does not bestow upon him the power to do something other than commute. If a President substitutes some penalty not provided by statute for the sentence imposed, he is doing something other than "commuting" the sentence.

Secondly, this Court's decisions indicate unmistakably that commutation must be to a form of punishment provided by law. In Biddle v. Perovich, supra, this Court upheld the right of the President to commute a death sentence to life imprisonment and ruled that consent of the prisoner to such commutation was not necessary. Considering the lawfulness of the commutation at issue, Mr. Justice Holmes, speaking for a unanimous Court, stated: "The only question is whether the substituted punishment was authorized by law . . .." 274 U.S. at 487 (emphasis added). As noted in the preceding paragraph, the Government's view on this issue was the same. Id. at 483.

In requiring that the substituted sentence be one provided by law, the Court simply reiterated a limitation it had implied over seventy years before. In Ex parte Wells, 59 U.S. (18 How.) 307 (1855), this Court passed on the validity of a commutation from death to life imprisonment. Upholding the President's action, the Court acknowledged that the law imposed limitations on the exercise of the President's pardon power. The Court stated that

> the power was to be used according to law; that is, as it had been used in England, and these States when they were colonies. . .. [Emphasis added.]

59 U.S. at 310.

Addressing the specific question of what these limitations were in the case of commutations (pardons with penal conditions), the Court made clear that the Chief Executive could not go beyond those punishments provided by law when commuting to a lesser punishment:

> So, conditional pardons by the king do not permit transportation or exile as a commutable punishment, unless the same has been provided by legislation. [Emphasis added.]
>
> 59 U.S. at 313.

Authorities cited by the court below and by the 1955 Attorney General's Opinion upon which the court heavily relied provide no support for the contention that a President may commute to a sentence not provided by law. First, several lower court decisions cited involved not commutations, but pardons with non-penal conditions. Kavalin v. White, 44 F.2d 49, 50 (10th Cir. 1930); Ex parte Weathers, 33 F.2d 294 (S.D. Fla. 1929); Lupo v. Zerbst, supra; Vitale v. Hunter, supra. Stroud v. Johnson, 139 F.2d 171 (9th Cir. 1943), and Ex parte Weathers, supra, cited below in support of the legality of conditional commutations, both rely upon Ex parte Wells, supra, as their authority. However, at issue in Wells was not a conditional commutation, but a simple commutation styled as a "conditional pardon." Also cited by Weathers, supra, at 295 was United States v. Wilson, 32 U.S. (7 Pet.) 150 (1833), which involved a simple pardon. In Bishop v. United States, 223 F.2d 582 (D.C. Cir. 1955), the court upheld the commutation of a death sentence to life imprisonment on the condition that the sentence be considered to

run from the date of commutation. The court supported its conclusion by one conclusory sentence citing no authority. 223 F.2d at 588.[8/]

Of the four Supreme Court decisions cited below in support of conditional commutations, not one is in point. Except for Wells, discussed above, none involved a commutation. At issue in Semmes v. United States, 91 U.S. 21, 27 (1875), was a pardon with a non-penal condition. In the only relevant language, the Court simply noted that pardons may be "subject to conditions and exceptions . . .." United States v. Klein, 80 U.S. 128, 142, 147 (1871), dealt with a general post-Civil War pardon and amnesty and stated simply that pardons may be granted on conditions. In Ex parte Grossman, 267 U.S. 87, 107, 120 (1925), the Court upheld the President's action remitting part of a sentence upon condition that the remainder of the sentence, a fine, be executed.

Thus, the authorities relied on in the court's decision below and in the Attorney General's 1955 opinion

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8/ The occasional disregard of the distinction between commutations and pardons with non-penal conditions may be traced to the close historical relationship of the two concepts and the fact that the power to commute derived directly from the power to pardon. The President's power to pardon was quickly held to include the power to pardon conditionally. E.g., United States v. Wilson, supra, at 160; Ex parte Wells, supra, at 313-15; Semmes v. United States, supra, at 27. It was an easy next step for the President to impose penal "conditions" on pardons, that is, to pardon on condition that the prisoner serve some lesser punishment. Although the Supreme Court discarded this semantic fiction in 1927 in Biddle v. Perovich, supra, the earlier overlapping usage of the terms "conditional pardon" and "commutation" has led a few courts to refer to all conditional pardons, including those with non-penal conditions, as "commutations." Such confusion is evident in some of the cases cited above.

furnish no support for the notion that a President may commute a sentence to some lesser form of punishment not provided by law. To the contrary, prior decisions of this Court touching upon this issue clearly indicate that when commuting a sentence a President must select the lesser punishment from those provided by law. To conclude otherwise would allow the President unilaterally to fashion and impose punishments of his own choosing.

The action taken in this case clearly transgressed these limitations. In place of the death sentence, Schick was given life imprisonment with no condition for parole. Such punishment is completely foreign to our system of law. Nowhere in the Uniform Code of Military Justice has Congress authorized such a punishment; under military law it is an unlawful sentence. Even under federal civilian criminal statutes -- to which Schick as a serviceman abroad was not subject -- such a punishment is nowhere to be found.

Nor may the President's action be saved by the language he chose to use. There is clearly no basis in logic or in law for distinguishing between a commutation to life imprisonment with no opportunity for parole and commutation to life imprisonment on the condition that the prisoner shall have no opportunity for parole. To attach legal significance to such a semantic distinction would be an unjustifiable elevation of form over substance.

Failure to grant this petition not only would represent an important departure from this Court's prior position with regard to limitations of the commutation

power, but would allow the Chief Executive in future cases to devise punishments of his own choosing and substitute them for sentences provided by law and imposed by trial courts.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

HOMER E. MOYER, JR.
ROBERT N. SAYLER
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner

October 31, 1973

ACTION BY THE PRESIDENT OF THE UNITED STATES

In the general court-martial case of Master Sergeant Maurice L. Schick, RA 33 688 357, United States Army, Detachment Army Medical Service, United States Army Hospital, 8169th Army Unit, APO 50, pursuant to the authority vested in me as President of the United States by Article II, Section 2, Clause I, of the Constitution, the sentence to be put to death is hereby commuted to dishonorable discharge, forfeiture of all pay and allowances becoming due on and after the date of this action, and confinement at hard labor for the term of his natural life. This commutation of the sentence is expressly made on the condition that the said Maurice L. Schick shall never have any rights, privileges, claims, or benefits arising under the parole and suspension or remission of sentence laws of the United States and the regulations promulgated thereunder governing Federal prisoners confined in any civilian or military penal institution (18 USC 4201 et seq., 10 USC 3662 et seq., 10 USC 871, 874), or any acts amendatory or supplementary thereof. As thus commuted, the sentence will be carried into execution. The prisoner shall be committed to the custody of the Attorney General.

Dwight D. Eisenhower

THE WHITE HOUSE
March 25, 1960

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

In the Board of Review, United States Army
Before
POTTER, GODDEL and BERNSTEIN
Members

CM 373879

UNITED STATES v. Master Sergeant MAURICE L. SCHICK, RA 33 688 357, Detachment Army Medical Service, United States Army Hospital, 8169th Army Unit, APO 50.	CENTRAL COMMAND Sentence adjudged 27 March 1958. Approved sentence: To be put to death.

APPELLATE COUNSEL FOR THE ACCUSED:
William C. DeValle, Esquire
Lieutenant Colonel Harley A. Lanning, JAGC

APPELLATE COUNSEL FOR THE UNITED STATES:
Major Merle C. Ridcout, Jr., JAGC

DECISION

The accused was charged with premeditated murder, in violation of Article 118 of the Uniform Code of Military Justice. He pleaded not guilty to the specification and the charge. He was found guilty of both and was sentenced to be put to death. The convening authority approved the sentence. No previous convictions were considered by the court.

The offense occurred at Sagamihara, a dependent housing project, near Camp Zama, Tokyo, Honshu, Japan, on 21 November 1953. The victim was Susan, the eight year old daughter of Colonel and Mrs. Jacquard H. Rothschild, an Army officer assigned to Army Forces Far East.

The evidence adduced by the prosecution establishes that on the afternoon of 21 November 1953 Susan visited with the daughter of Sergeant Clark L. Overton, who lived on the reservation in quarters 1148-c. Later in the afternoon at about 1705 hours, she left Sergeant Overton's quarters riding her bicycle towards home. She rode easterly

in the direction of a path running generally east and west across the area. This path was frequently used by the children in order to avoid the traffic on the roads. She was wearing a green polka-dot dress, a western style jacket and a white handkerchief, or scarf, on her hair.

At about the same time Susan started for home a soldier entered the area at Gate #2, asked the gate guard the time and proceeded westwardly along the path.

When Susan did not return home her father called Sergeant Overton inquiring if she was still at his home. When told that she had left, Colonel Rothschild asked Sergeant Overton to help him search for the little girl.

A short time later Colonel Rothschild found Susan's body lying face downward under water in a moat which runs parallel to the path. She had been gagged with her panties and the lower portion of her torso was bare. Her shoes were found nearby on the path. Her bicycle, facing eastward, was still leaning on its rest at a place about 8 feet south of the path and about 25 feet from where her shoes were found. Susan's white scarf was found on the path about four feet from her bicycle.

A medical examination, made soon after the discovery of the body, established that there were bruise marks and abrasions about Susan's neck, some swelling of her eyelids and blood in her trachea. An autopsy established that there was an increased amount of blood in most of the organs, particularly in the lungs and brain and a swelling in the voice box, trachea and lungs. The cause of death was established as asphyxia due to strangulation or possibly drowning.

After the prosecution had established the corpus delicti by competent evidence the signed pretrial statement of the accused was admitted into evidence as Prosecution's Exhibit #1 (R 237), without objection by defense counsel. Without going into details of the offense, it is sufficient to state that the accused admitted killing Susan by choking her and by placing her face down in the moat and by holding her head under water with his foot. Defense submitted no evidence on the merits of the case (R 240).

Defense raised the question of the mental capacity of the accused and prior to the submission of the case on its merits made various motions for continuances to permit psychiatric examination of the accused by civilian psychiatrists. After overruling a motion for an

indefinite delay, the law officer granted a continuance for the purpose of having accused examined by two qualified Japanese civilian psychiatrists. Prior to trial, a board of Army psychiatrist had been convened to examine and to determine the mental status of the accused.

The record of trial is replete with evidence concerning accused's mental responsibility at the time of the commission of the offense and at the time of trial. Suffice it to say that the Japanese doctors determined that accused was psychotic, either epileptic or schizophrenic (R 71) and that he was unable to distinguish right from wrong or to adhere to the right (R 69). The board of Army psychiatrists, on the other hand, diagnosed the accused as follows: Antisocial personality, chronic severe, with aggressive and sadistic tendencies, manifested by life-long disciplinary difficulties, inability to profit from experience, absence of real loyalties to persons, groups or codes, and in this case by egocentricity, grandiosity, a desire for competence, impulsive aggressive outbursts, excessive indulgence in alcohol, and a tendency to make and act upon his own laws (R 125-156, 163). The board members further determined that at the time of the commission of the offense, he could differentiate between right and wrong, could adhere to the right and that at the time of the trial he could understand the nature of the proceedings against him and intelligently conduct or cooperate in his own defense (R 126, 157, 164).

Prior to filing an assignment of errors, the civilian appellate defense counsel and the military appellate counsel filed with the board of review a motion requesting the board to direct that the accused be transported from Japan to the United States for further psychiatric examination. Subsequent to the filing of this motion defense counsel filed their assignment of errors.

Civilian defense counsel argued both the motion and the errors set forth in the assignment of errors at the same hearing before the board of review. He requested, that, as an alternative to the motion to return the accused for further psychiatric tests, the board of review forward the record of trial, containing the testimony of all the psychiatrists who examined the accused to the Surgeon General of the Army for an opinion concerning the mental responsibility of the accused. Pursuant to this request and in accordance with paragraph 124, Manual for Courts-Martial, United States, 1951, and Rule IX f 3 of the Uniform Rules of Procedure in and before the Boards of Review, the board forwarded the allied papers and the record of trial to the Surgeon General of the Army who subsequently returned the documents to the board of review stating that in his opinion

"a. The accused was at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged to distinguish right from wrong.

"b. The accused was at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged to adhere to the right.

"c. The accused at the time of trial did possess sufficient mental capacity to understand the nature of the proceedings against him and intelligently to conduct or cooperate in his defense.

"d. There is no indication in the available record that the accused does not at the present time possess sufficient mental capacity to understand the nature of the appellate proceedings in this case and intelligently to cooperate in his defense."

The instructions of the law officer concerning the elements of the offense charged and on the issue of the sanity were correct. The lesser included offenses were submitted to the court-martial under full, complete and appropriate instructions. The factual situation was decided by the court-martial adversely to the accused. There appears to be nothing of record to merit disturbing the finding and sentence of the court.

The board of review has given careful consideration to the assignment of errors filed by the appellate defense counsel and has heard extended oral argument in support thereof. The assignment of errors is considered without merit. The finding of guilty and the sentence are supported by the competent evidence of record.

For the reasons stated above the board of review finds the approved finding of guilty and the sentence correct in law and in fact and having determined on the basis of the entire record that they should be approved, the same are hereby

Affirmed.

UNITED STATES v SCHICK

UNITED STATES, Appellee
v
MAURICE L. SCHICK, Master Sergeant, U. S. Army, Appellant

6 USCMA 493, 20 CMR 209

No. 6388

Decided November 18, 1955

On mandatory review. CM 373479, not reported below. Remanded.

William C. DuValle, Esq., argued the cause for Appellant, Accused. With him on the brief were *Lieutenant Colonel James M. Scott* and *Lieutenant Colonel Harley A. Lanning.*

Major Merle C. Rideout, Jr., argued the cause for Appellee, United States. With him on the brief was *Lieutenant Colonel Thomas J. Newton.*

Opinion of the Court

ROBERT E. QUINN, Chief Judge:

A general court-martial in Tokyo, Japan, tried, convicted, and sentenced the accused to death for the premeditated murder of eight-year-old Susan Rothschild. Intermediate appellate authorities affirmed the accused's conviction and sentence, and the case was forwarded to this Court for review. Article 67(*b*)(1), 50 USC § 654.

After the appeal was assigned for argument in this Court, appellate defense counsel moved to remand the case to the board of review, or, in the alternative, for a continuance, for the purpose of obtaining a psychiatric examination of the accused by a civilian psychiatrist. We granted a continuance and directed that the findings of the phychiatrist be reported to this Court.

A team of staff psychiatrists and psychologists of the Menninger Clinic examined the accused. Their report says that, in their opinion, the accused was unable to adhere to the right with regard to the offenses charged at the time he committed the crime. They also indicate that they consider the accused "at this time, permanently and incurably ill."

Headnote 1

Once an accused has had a fair opportunity at the trial level to litigate the issue of his mental responsibility for an offense and his capacity to stand trial, those issues should, on appeal, be accorded the same treatment as all other contested matters. We mean that the question should not be tried *de novo* at every appellate level. A day in court means one fair and just trial of contested issues, and, when that has been granted to an accused, he does not have a right to a second trial in an appellate forum.

Headnote 2

The unusual circumstances here which prompt us to permit further consideration of accused's sanity merit enumeration. This accused has been sentenced to death for the commission of an atrocious crime. He was tried in Japan where the only civilian medical experts available to him were Japanese. One of the psychiatrists was obliged to testify through an interpreter, and, thus, he may have labored under a rather severe handicap in his ability to convey his findings to the court-martial. Both medical witnesses had a minimum of time to conduct their examinations, and they indicate that during the trial they were handicapped in the development of the bases for their conclusions.

In view of the Menninger report, and the circumstances set out above, we remand the case to the board of review for reconsideration of the question of the accused's sanity. United States v Bell, 6 USCMA 392, 20 CMR 108; United States v Washington, 6 USCMA 111, 19 CMR 240. The board of review will evaluate that report in conjunction with the evidence in the record and with such other psychiatric evidence as it may obtain in an investigation of its own if

it considers such investigation necessary or desirable. United States v Burns, 2 USCMA 400, 406, 9 CMR 30. In taking this action we are not holding out to accused persons the hope that this Court will require boards of review to become trial forums. Only when a situation is as unusual as this can we be asked to exercise our discretion.

Headnote 3

A procedural matter of some significance merits comment. This case reached the Court on mandatory review. As previously noted, appellate defense counsel moved to remand the case to a board of review or, in the alternative, for a continuance until a psychiatric examination could be made and a report filed in this Court. This prayer for relief was unusual. We entertained the motion because of the special circumstances earlier enumerated, and we granted a continuance. After the psychiatric report was received by the Court, the issue was set down for oral argument. Counsel for both parties appeared and in open court indicated that they were prepared to and would argue both the motion to remand and the errors raised on appeal. They were permitted to do so. Consequently, if this case again reaches this Court, no additional arguments will be heard, unless it clearly appears that questions are raised by the decision of the board of review which were not in issue at the time of argument.

To avoid any possible misunderstanding, it should be understood by the board of review that our reference to unusual circumstances is for the purpose of emphasizing that this case is *sui generis*. We express absolutely no opinion on the merits of the accused's defense of insanity. The board of review should consider the entire record, including the recently submitted report, uninfluenced by any proceeding before this Court, or by the procedure directed by us. The responsibility for making appropriate factual findings rests solely with the members of the board of review.

Judges LATIMER and BROSMAN concur.

UNITED STATES v SCHICK
(CM 373479 (recon))

UNITED STATES
v
Master Sergeant MAURICE L. SCHICK, RA 33688337,
Detachment Army Medical Service, United States
Army Hospital, 8169th Army Unit, APO 50

CM 373479 (recon)*

Sentence adjudged 27 March 1954. Approved sentence: To be put to death.

Appearances: Mr. William C. DuValle, Mr. Harlow M. Huckabee, Lieutenant Colonel James M. Scott, JAGC, appellate counsel for the accused; Captain M. Douglas Hodges, JAGC, appellate counsel for the United States.

* Original decision by board of review not reported below.

DECISION ON RECONSIDERATION

Upon original review of the record of trial in the instant case the Board of Review by its decision dated 30 November 1954 affirmed the approved findings of guilty of premeditated murder, in violation of Article 118 of the Uniform Code of Military Justice, and approved the death sentence.

Since this case involves a sentence to death, a mandatory appeal was taken to the United States Court of Military Appeals. Article 67(*b*)(1), Uniform Code of Military Justice. Subsequent to the filing of the appeal and prior to argument on the merits, appellate defense counsel moved the Court to remand the case to the Board of Review, or, in the alternative, for a continuance for the purpose of obtaining a psychiatric examination of the accused by a civilian psychiatrist. The Court granted the continuance and directed that the findings of the psychiatrist be filed with the Court. In compliance with the order of the Court the accused was examined by psychiatrists and psychologists of the Menninger Clinic, who submitted their findings to the Court by a comprehensive report dated 19 August 1955. On 6 October 1955 arguments by counsel were heard and the case was submitted to the Court.

By order dated 30 November 1955, the United States Court of Military Appeals remanded the case to The Judge Advocate General of the Army for reference to the Board of Review for further review in accordance with the Court's opinion dated 18 November 1955 (United States v Schick (No. 6388), 6 USCMA 493, 20 CMR 209). On 6 December 1955, The Judge Advocate General returned the case to the Board of Review for further action in accordance with the mandate of the Court. Subsequent to said reference, oral arguments by appellate defense and Government counsel on the question of the sanity of the accused were heard.

Pursuant to Rule IX F 3, Uniform Rules of Procedure for Proceedings In and Before Boards of Review, a Board of Review is empowered to consider matters outside the record of trial with respect to matters affecting the sanity of an accused tending to show that further inquiry as to his mental condition is warranted in the interest of justice. Consequently this board will receive and evaluate all matter concerning the mental responsibility of the accused obtained subsequent to the prior decision of this board.

Headnote 1

The report of the Menninger Clinic concludes as follows:

"A. The subject is suffering from a definite mental illness characterized by periodic episodes of uncontrolled violence and excitement, interspersed with periods in which he appears either normal or rebellious and antisocial to casual observers. Even in these non-violent periods, there is evidence of the underlying mental illness. In the American Psychiatric Association Standard Nomenclature currently in use, this illness would be classified as, Schizophrenic Reaction, chronic, undifferentiated type, manifested by episodes of transitory dereistic excitement, inappropriate emotional responses, extensive inner fantasy life, perplexity and concern over mental illness, blurring of boundaries between fantasy and realty, impulsive aggressive behavior, with egocentricity and fantasies of omnipotence.

External Precipitating Stress: Unknown

Predisposition: Severe; lifelong pattern of anti-social behavior.

Degree of Impairment: Severe; requires hospitalization.

"B. The actual murder itself was senseless, from any rational point of view, but was related in many irrational ways to patient's pathological thinking and feeling. It was definitely a product of the illness and the culmination of the gradual decompensation of a chronically sick person.

"C. On the basis of our examination of the patient, a review of his history, and a study of his previous medical records, it seems clear he has a mental disease which deprived him completely of the power of choice and volition so that he was unable, concerning the particular act charged, to adhere to the right."

This report was forwarded to The Surgeon General of the Army for his opinion as to the accused's mental responsibility. His opinion, dated 9 January 1956, is as follows:

"3. After reconsideration of the records available on 12 November 1954 at the time of his first review and consideration of the new medical studies and opinions presented in the Menninger Clinic Report, Doctor Guttmacher's letter, and reports from the United States Disciplinary Barracks, Fort Leavenworth, The Surgeon General continues to concur in the diagnosis of a character and behavior disorder as set forth in the Board of Medical Officers convened at the United States Army Hospital, 8167th AU, APO 1055, San Francisco, California, dated 19 January 1954 and 6 February 1954. With particular reference to the questions asked in paragraph 3, Comment No. 1, TJAG, 15 December 1955, The Surgeon General is of the following opinion:

a. The accused was at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged to distinguish right from wrong.

b. The accused was at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged to adhere to the right.

c. The accused at the time of trial did possess sufficient mental capacity to understand the nature of the proceedings against him and intelligently to conduct or cooperate in his defense.

d. There is no indication in the available record that the accused does not at the present time possess sufficient mental capacity to understand the nature of the appellate proceedings in this case and intelligently to cooperate in his defense."

Subsequently all of the reports and testimony herein referred to were submitted by appellate defense counsel to Dr. Winfred Overholser for his study and opinion. By a report dated 21 January 1956, he stated:

"However, even with all the psychiatric defects of the present 'tests,' it is my considered opinion that Schick is entitled to a verdict of acquittal by reason of insanity."

Our prior decision set forth the evidence at the trial level concerning the commission of the offense, the diagnosis of the Japanese doctors employed by the defense and the diagnosis of the Board of Army psychiatrists. The substance of the testimony of the Japanese doctors was that the accused was psychotic, either epileptic or schizophrenic, and that he was unable to distinguish right from wrong or to adhere to the right. The Army Board of psychiatrists' conclusions and diagnosis was that:

"(1) The clinical psychiatric diagnosis is antisocial personality.

"(2) The accused knew at the time of the alleged offense that the act was wrong.

"(3) The accused was able at the time of the alleged offense to adhere to the right.

"(4) His intelligence level is bright normal, with an intelligence quotient of 115.

"(5) He was not drunk at the time the alleged act was committed. He was drinking prior to that time but did so voluntarily. He is not a chronic alcoholic or a victim of an alcoholic psychosis. He did not have 'pathologic intoxication.'

"(6) He understands the nature and seriousness of the charges. He is mentally capable of cooperating in his own defense.

"(7) He was capable of forming the degree of intent, willfulness, malice and premeditation called for by the nature of the offense charged.

"It was the unanimous conclusion of the Sanity Board that the patient, M/Sgt Maurice L. Schick, is now, was in the past, and was at the time of the commission of the alleged offense, entirely sane, competent and responsible for his actions, able to differentiate between right and wrong, and able to adhere to the right. He has a history of life-long maladjustment, rebellion towards superiors, and resentment toward authority, all of which reflect poor interpersonal relationships in his family, resentment of his parents' restrictions and his eldest brother's superiorities, delinquent and non-conforming behavior, and on a number of occasions, incredibly antisocial homicidal acts. These latter have been consistently rationalized and justified in the patient's mind by invoking his own special set of moral standards. It is therefore true beyond any doubt that this man is abnormal. It is by the nature of our social organization abnormal to kill other members of the society except when one's own life is threatened or in some similar conventionally accepted situation. Like any antisocial personality, this man, while grossly abnormal, is not insane. The difference does not consist of a finely shaded definition. This patient was capable of forming an intent and of acting in a complex, carefully thought-out way on the basis of his intent. No profound change has occurred in his personality or character and no such change is likely to occur. He is therefore at this moment essentially the same as he was when he allegedly killed Susan Rothschild . . . . He is considered to be a menace to society and because his behavior is not the result of a transient personality disorder or a transient or curable mental disease, it is the considered opinion of this Board that he will throughout his life continue to be a menace to society. It is strongly recommended, whatever the findings of the court in this case and whatever the sentence in the event of conviction, that steps be taken to segregate this man from society to prevent the repetition of his confessed homicidal acts. Since this man is not psychotic, he cannot be committed to an institution for the mentally ill."

On 2 November 1954 the record of trial and trial level psychiatric reports were submitted to The Surgeon General of the Army for his opinion as to the mental responsibility of the accused at the time of the commission of the offense and at the time of trial. He replied, on 12 November 1954, stating that he concurred in the diagnosis, findings, conclusions and recommendations of the Board of Medical Officers who had previously examined the accused.

The Menninger report, the latest opinion of The Surgeon General, including the inclosures thereto, and Dr. Overholser's opinion, dated 24 January 1956, is the only additional evidence not considered by the Board of Review in its original review of the record of trial and in arriving at its prior decision. This evidence is substantially the same as that considered and evaluated by the court-martial at the trial which was decided adversely to the accused.

The question now presented for consideration is whether the report of the Menninger Clinic and Dr. Overholser's opinion, when weighed and evaluated with the testimony of the witnesses at the trial, and the opinions of The Surgeon General, dated 12 November 1954 and 9 January 1956, are sufficient to raise a reasonable doubt in the minds of the members of the board as to the accused's sanity. It is the opinion of the Board of Review that the reports of the Menninger Clinic and Dr. Overholser disclose no essentially new facts not previously known to the court-martial, which as the finders of the facts saw and heard all the evidence, including that of the Japanese psychiatrists and the Army psychiatrists, and, under proper instructions from the law officer, resolved the issues against the accused.

Headnote 2

The Board of Review is under no compulsion to accept the above reports as a matter of law. United States v Kunak (No. 3797), 5 USCMA 346, 17 CMR 346. The United States Court of Military Appeals in that case said:

". . . While the evidence last obtained was contrary to other expert testimony in the record, we cannot say that the board of review was compelled to accept it as a matter of law . . . .

". . . The latest acquired evidence merely created a disputed question of fact which, under the provisions of the Code, the board was permitted to resolve. Its decision is not subject to reversal if there is substantial evidence to support it. . . ."

The Board of Review believes that the following statement from Holloway v United States, 148 F2d 665 (App DC, 1945), cert den 334 US 852 (1948), 92 L ed 1774, 68 S Ct 1507, is apropos of this case:

"And so it is that when psychiatrists attempt on the witness stand to reconcile the therapeutic standards of their own art with the moral judgment of the criminal law they become confused. Thus it is common to find groups of distinguished scientists of the mind testifying on both sides and in all directions with positiveness and conviction. This is not because they are unreliable or because those who testify on one side are more skillful or learned than those who testify on the other. It is rather because to the psychiatrist mental cases are a series of imperceptible gradations from the mild psychopath to the extreme psychotic, whereas criminal law allows for no gradations. It requires a final decisive moral judgment of the culpability of the accused. . . .

". . .

". . . To justify a reversal circumstances must be such that the verdict shocks the conscience of the court." (p 667)

Consequently, pursuant to our power under the Uniform Code of Military Justice, Article 66(c), and in accordance with the order of the United States Court of Military Appeals, the board has considered reports of Doctors Menninger and Overholser concerning the accused's sanity and evaluated them in conjunction with the evidence of record, together with the latest opinion of The Surgeon General of the Army and has independently arrived at the same conclusion as the members of the court-martial, and finds that the accused was at the time of the offense and at the time of trial and is presently beyond a reasonable doubt mentally responsible for his acts.

For the reasons stated, upon reconsideration the Board of Review finds the findings of guilty and the sentence as approved by proper authority correct in law and fact and having determined on the basis of the entire record that they should be approved, the same are hereby

Affirmed.

GOLDEL, STEELE and BERKOWITZ, Judge Advocates. 20 February 1956.

UNITED STATES v SCHICK

UNITED STATES, Appellee
v
MAURICE L. SCHICK, Master Sergeant, U. S. Army, Appellant
7 USCMA 419, 22 CMR 209

No. 6388

Decided December 7, 1956

On mandatory review. CM 373179, original decision not reported below; decision on reconsideration reported below in 21 CMR 343. Affirmed.

William C. Duralle, Esq., argued the cause for Appellant, Accused. With him on the brief were *Harlow M. Huckabee*, Esq., and *Lieutenant Colonel James M. Scott*.

Captain Thomas J. Nichols argued the cause for Appellee, United States. With him on the brief were *Lieutenant Colonel Thomas J. Newton, Major Merle C. Ridcout* and *Captain M. Douglas Hodges*.

Opinion of the Court

HOMER FERGUSON, Judge:

The accused was convicted by general court-martial of the premeditated murder of eight-year-old Susan Rothschild at Tokyo, Japan, in violation of Article 118, Uniform Code of Military Justice, 50 USC § 712. He was sentenced to death. On May 10, 1954, the sentence was approved by the convening authority. The board of review, by decision dated November 30, 1954, affirmed and approved the death sentence. A mandatory appeal, under Article 67(*b*)(1), of the Uniform Code of Military Justice, 50 USC § 654, was taken to this Court. After the appeal, and prior to argument on the merits, appellate defense counsel moved to remand the case to the board of review, or, in the alternative, for a continuance for the purpose of obtaining a civilian psychiatric examination of the accused. This Court granted the continuance and directed that additional findings of the psychiatrist be filed with the Court. The accused was examined by psychiatrists and psychologists of the Menninger Clinic, who submitted their findings by a well-written and comprehensive report dated August 19, 1955. Arguments were heard by counsel on October 6, 1955, and the case was submitted to the Court. By an opinion decided on November 18, 1955 (6 USCMA 493, 20 CMR 209), the Court remanded the case to The Judge Advocate General of the Army for reference to the board of review for additional review with respect to a reconsideration of the accused's sanity. The case was returned to the board of review and oral arguments by the defense and Government counsel were heard on the question of sanity. By decision, dated February 20, 1956, the board of review again affirmed the findings and sentence. Following the final board of review decision the accused filed a supplemental brief listing additional assignments of error. The case was then reargued before the full Court.

The pertinent issues now before the Court are:

1. Whether the law officer erred in refusing to grant further time for additional psychiatric study.

2. Whether the use of the Army Technical Manual (Tech Manual) TM 8-240, Psychiatry in Military Law, by the court-martial and the board of review precluded its exercise of independent judgment.

3. Whether the law officer's refusal to instruct as requested on the effect of partial mental deficiency upon the ability of the accused to premeditate was prejudicial, and therefore requires a rehearing.

4. Whether the board of review applied the rule cited by it in its opinion that "To justify a reversal circumstances must be such that the verdict shocks the conscience of the court," and therefore committed reversible error.

The record discloses the following facts: During the early evening hours of November 21, 1953, the lifeless body of eight-year-old Susan Rothschild was found by her father. It was lying face down in a moat at Camp Zama, Japan. A medical examination revealed that death had been caused by strangulation or drowning less than an hour earlier. Six days later, to agents of the Criminal Investigation Division of the Army, the accused confessed that he had met Susan, talked with her about ten minutes, and then, as she turned to leave "I grabbed her and choked her." After choking her, he gagged her with her "panties" and dragged her into a ditch. [illegible] held her face under the water. The accused had been drinking since about noon that day. The reason for the homicide was "just that she was there." After the deed was done, he experienced a sexual release.

The accused was charged with premeditated murder and the only issue raised before and during the trial was that of sanity. Upon each occasion counsel for the accused attempted to obtain psychiatric examination of the accused by nonmilitary American doctors. Although his efforts with respect to American doctors were unsuccessful, he did succeed in obtaining the services of two Japanese psychiatrists. They were Dr. Takeo Doi, Department of Neuro-psychiatry, Tokyo University Medical School, and Dr. Susumu Hayashi, Superintendent of the Tokyo Metropolitan Matsurawa Mental Hospital. Both testified at the trial that they had examined the accused, along with all pertinent records relating to his mental responsibility, and, in their opinion, at the time of the offense he was suffering from schizophrenia, and he could neither distinguish right from wrong nor adhere to the right.

Four Army psychiatrists testified for the prosecution. All had examined the accused and had studied [illegible] regarding his mental capacity. Each

testified that the accused was, in his opinion, suffering from a nonpsychotic behavior disorder and accordingly was able at the time of the offense to distinguish right from wrong, to adhere to the right, and at the time of the trial was able to understand the nature of the proceedings against him and cooperate intelligently in his defense.

The additional evidence on the accused's sanity considered by the board of review and now before us is (1) A psychiatric and psychological report from the Menninger Clinic, which classified the accused as suffering from:

> ". . . [A] definite mental illness characterized by periodic episodes of uncontrolled violence and excitement, interspersed with periods in which he appears either normal or rebellious and anti-social to casual observers. Even in these non-violent periods, there is evidence of the underlying mental illness. In the American Psychiatric Association Standard Nomenclature currently in use, this illness would be classified as, Schizophrenic Reaction, chronic, undifferentiated type, manifested by episodes of transitory dereistic excitement, inappropriate emotional responses, extensive inner fantasy life, perplexity and concern over mental illness, blurring of boundaries between fantasy and reality, impulsive aggressive behavior, with egocentricity and fantasies of omnipotence.
>
> . . . . .
>
> "C. On the basis of our examination of the patient, a review of his history, and a study of his previous medical records, it seems clear he has a mental disease which deprived him completely of the power of choice and volition so that he was unable, concerning the particular act charged, to adhere to the right."

The report concluded,

> "Yet, regardless of any disagreement about how sick he is between excited episodes, it seems clear that the offense arose during, and was a manifestation of, an acute psychotic episode. There is a definite history of similar episodes prior to the offense, and the examination reveals, in minature [*sic*], the kind of pathology that can be easily and sometimes unpredictably precipitated into violent episodes. In our opinion, these episodes will recur in the future. Unfortunately, present day psychiatric treatment techniques offer nothing for this man, and we would have to consider him, at this time, permanently and incurably ill. As psychiatrists, we simply have to say that this man is dangerous to society, and will remain so for many years, probably all of his life. He should not be released to society unless there is clear cut evidence of major change for the better in those pathological psychological processes demonstrated to be present."

(2) A statement, based upon the trial record and medical reports, from Dr. Winfred Overholser, Superintendent, St. Elizabeth's Hospital, Washington, D. C., wherein he announces the opinion that it is doubtful whether the accused could distinguish right from wrong at the time of the offense; however, he has no doubt but what the accused was *unable* to adhere to the right and could not have premeditated with regard to the offense charged. But the accused *could* understand the nature of the trial and appellate proceedings against him; *could* cooperate intelligently in his defense; (3) A statement from Dr. Manfred S. Guttmacher, Chief Medical Officer of the Supreme Bench of Baltimore, Maryland, in which he notes that the accused's conscious controls are profoundly affected by alcohol. Dr. Guttmacher did not, however, designate the accused as being a paranoid schizophrenic, but rather as suffering from "profound character neurosis, with periods of psychotic-like behavior, particularly when imbibing alcohol." He "inclined" toward the view that the accused was able to distinguish right from wrong but was *unable* to adhere to the right. He points out that in this area judgments are extremely difficult to make and if present military medical criteria were applied, the accused should "probably be considered responsible"; (4) A report from The Surgeon General of the Army, dated

January 9, 1956, in which he reviews the Menninger Report and previous material relating to the sanity of the accused. In the opinion of The Surgeon General, the accused could distinguish right from wrong, could adhere to the right, and possesses sufficient mental capacity to understand the nature of the proceedings against him.

After reviewing the additional information as to the accused's sanity, the board of review again
Headnote 1 found the accused mentally responsible for his acts. The conviction was affirmed. There was substantial evidence to support the board's finding, and, therefore, this Court cannot find that as a matter of law the board erred. United States v Bunting, 6 USCMA 170, 19 CMR 296.

The accused argues that his rights were prejudiced by the refusal of the law officer to allow him
Headnote 2 time for additional psychiatric study. Perhaps it would have been more appropriate to have granted the accused additional time for examination by the Japanese psychiatrists, but we cannot say that under the circumstances of this case the accused did not have sufficient time to prepare his defense. From December 1, 1953, to February 6, 1954, a board of medical officers examined the accused, and their report was sent to the defense counsel on February 9, 1954. On the same date the defense counsel requested the commanding officer to send the accused to Topeka, Kansas, to be examined by the Menninger Clinic. February 16, 1954, the defense was informed that its request would not be complied with. However, Government facilities, records on the accused, and Government psychiatrists were available to the accused and counsel. On March 16, 1954, counsel for the accused asked for a month's continuance in order to obtain a deposition from Dr. Menninger. This motion was denied. Counsel then moved for an indefinite continuance for time to bring —if possible—Drs. Menninger, Kezal, or Overholser to Japan. This motion was also denied but a continuance was granted for one week to secure Japanese psychiatrists. The defense moved again on March 22, 1954, for a continuance in order to obtain the presence of Dr. Overholser as a material witness; however, the defense could furnish nothing definite with respect to whether, if ever, Dr. Overholser would be available in Japan. An additional continuance for two days was granted. We note that the Japanese psychiatrists stated that in their opinion the accused was not responsible for his acts. That being so, and from all the facts we cannot find the rulings of the law officer to be as a matter of law reversible error. In any event, the determination as to whether the request for a continuance should or should not have been granted rested within the sound discretion of the law officer. Under the circumstances of this case we cannot say that he abused that discretion. See United States v Knudson, 4 USCMA 587, 16 CMR 161.

The accused also argues that he was prejudiced because use of the Department of Army Technical Manual, TM 8-240, Psychiatry in Military Law, by the court-martial and board of review, precluded their exercise of independent judgment. In this connection we announce that at most the
Headnote 3 "Tech Manual" occupies the position of a text book or treatise on the subject of insanity. (See opinion of Chief Judge Quinn, United States v Kunak, 5 USCMA 346, 17 CMR 346.) It is not competent evidence of either the facts or opinions advanced by the authorities. It may be used to a limited extent in connection with the testimony of an expert witness, but it does not have any independent probative value. A study of the record in this case now
Headnote 4 before us makes it abundantly clear that all the psychiatrists who testified at the trial arrived at their respective conclusions from an independent evaluation of many factors taken from numerous sources and the witnesses appeared to be completely unfettered by the "Tech Manual." As a matter of fact, there is no mention of this Manual throughout the trial. All of the psychiatric testimony for the Government was to the effect—without equivocation—that

the accused knew what he was doing at all times, could distinguish right from wrong and adhere to the right as to the offense charged. And at no place in the law officer's instruction did he advert to the "Tech Manual" or call the court's attention thereto.

During an out-of-court conference the accused requested the following instruction: "There is other evidence in this case which you may properly weigh with the evidence of voluntary intoxication in determining the accused's reasoning ability, such as the history of impulsive aggressive outbursts described by various witnesses before this court and the mental status of the accused as described by the expert witnesses." The accused assigns as error the refusal of the law officer to give this instruction on partial insanity as affecting premeditation. Although the law officer refused the requested instruction he gave instead, "In the light of all the evidence, if you have a reasonable doubt that the accused was mentally capable of entertaining the premeditated design to kill involved in the offense of premeditated murder you must find him not guilty of that offense." The law officer felt that this instruction adequately covered the effect of partial insanity on premeditation. During the out-of-court conference, he stated, "I am not going to give your proposed instruction . . . I believe my instruction is sufficient to cover all that without enumerating the evidence." In United States v Smith,
Headnote 5 5 USCMA 314, 17 CMR 314, the trial court was given an almost identical instruction. This Court held, "This instruction adequately informed the court of the possibility of partial responsibility—and a consequent finding of unpremeditated murder. Thus, no error inheres in the *finding* of premeditated murder. Cf. United States v Kunak, supra." Also see United States v Higgins, 4 USCMA 143, 15 CMR 143. Moreover, the requested instruction in the instant case was somewhat similar to the instruction requested by the defense in United States v Dunnahoe, 6 USCMA 745, 21 CMR 67. As set out in that case, the pertinent portions of the requested instruction read:

"'There is other evidence in this case which you may properly weigh with or against the evidence of voluntary drunkenness in determining the accused's reasoning ability, such as the evidence of the accused's muscular coordination immediately before and immediately after the alleged offense, the accused's ability to speak coherently shortly after the offense, the accused's apparent lack of concern for himself shortly after the alleged offense, the accused's failure to conceal the body of the alleged victim, the accused's failure to obtain or conceal certain real evidence which tended to connect him with the alleged offense, the accused's statements to fellow soldiers made shortly after the alleged offense, and the accused's ability later to remember certain of the details surrounding the alleged offense.

"'If, in the light of all the evidence, you have a reasonable doubt that the accused was mentally capable of entertaining the premeditated design to kill involved in the offense of premeditated murder, you must find him not guilty of that offense.'"

This Court stated, after inspection of the quoted portions of the instruction (exclusive of the second paragraph, which was considered sufficient to meet the standards of partial insanity in Smith, supra, and Kunak, supra), that:

". . . The vice of the requested instruction is that it singles out bits of evidence and emphasizes them to the exclusion of others. An accused may not isolate particular facts of the case favorable to him and demand that the law officer give undue prominence to them. Neither may he, by suggesting some facts, require the law officer to summarize every fact for or against every issue. United States v Harris, 6 USCMA 736, 21 CMR 58."

It was precisely for this reason that the requested instruction was refused in the case now before the Court. When the requested instruction was proffered

by the defense, the trial counsel objected as follows:

> ". . . I should like to suggest in reference to what counsel has offered that if there is to be any reference to specific evidence then all of the specific evidence which might be considered upon the issue should also be referred to and that in any event it should always be said in any instruction that this and all other evidence in the case touching upon these issues are what you should consider in arriving at your findings."

Likewise, here, the law officer—in line with the Court's reasoning, later reflected in Dunnahoe, supra—apparently concluded that the defense counsel was asking him to "single out bits of evidence and emphasize them to the exclusion of others," and feeling that he was going to give an instruction which would be sufficient as to the effect on premeditation of mental deficiency short of insanity, refused the instruction with the remark that, "I believe my instruction is sufficient to cover all that without enumerating the evidence." The better practice would have been for the law officer to have specified the circumstances bearing upon the problem here. But we are of the opinion that his failure so to do did not prejudice the accused. The law officer's instructions, taken as a whole, were adequate. In passing, we note that appellate defense counsel complains of the definition of "irresistible impulse" given by the law officer at the trial. Portions of this instruction were discussed in an out-of-court hearing and certain modifications were made at the defense counsel's request. After the modifications, counsel for the accused voiced no additional objections to this part of the law officer's instruction. As given, the instructions on irresistible impulse follow the Manual.

Headnote 6

The accused maintains that his rights have been prejudiced by the board of review by applying an appellate rule that "to justify a reversal circumstances must be such that the verdict shocks the conscience of the court." This, of course, is not the proper test which should be applied by a fact-finding tribunal and if the board in fact applied such a test, it would be error. However the foregoing language was tacked on to another quotation by the board which had to do with conflicting psychiatric testimony. The entire quotation was taken from Holloway v United States, 148 F2d 665 (CA DC Cir) (1945), cert den 334 US 852 (1948), 92 L ed 1774, 68 S Ct 1507. The quoted portion applies to the Federal courts which have no fact-finding powers. But, the board of review here had fact-finding powers and therefore this language has no application to it. Article 66, Uniform Code of Military Justice, 50 USC § 653. Following the quotation from the Holloway case, supra, the board concluded its opinion, with the following terminal paragraph:

Headnote 7

> "Consequently, pursuant to our power under the Uniform Code of Military Justice, Article 66(c), and in accordance with the order of the United States Court of Military Appeals, the board has considered reports of Doctors Menninger and Overholser concerning the accused's sanity and evaluated them in conjunction with the evidence of record, together with the latest opinion of The Surgeon General of the Army and has independently arrived at the same conclusion as the members of the court-martial, and finds that the accused was at the time of the offense and at the time of trial and is presently beyond a reasonable doubt mentally responsible for his acts."

Clearly the board of review did not apply the quoted language to its finding for it is apparent from the board's own language that it concluded, after studying all the evidence, that the guilt of the accused had been established beyond a reasonable doubt.

We have reviewed the record of trial with care. The accused was represented by two attorneys, then in uniform, now in the civilian practice of law, who were competent trial lawyers, and they guarded the rights of their client with commendable force and vigor. The court-martial under proper instructions on the law decided the issue of fact against the accused. The board of review with its fact-finding powers has also decided the issue against the accused. We find no errors of law which prejudiced the substantial rights of the accused.

The decision of the board of review is affirmed.

Chief Judge QUINN concurs.

LATIMER, Judge (dissenting):

I dissent.

This is a most difficult case to decide objectively because we are faced with a beastly and senseless crime committed against a child of tender years. Nonetheless, the accused is one whose mental processes have, by any medical yardstick, been impaired. There is practically no dispute in the facts, for the killing is admitted, the accused's medical history is not controverted, and the evidence upon which the experts base their opinions is settled. The real dispute concerns the conclusion to be drawn from the medical evidence, for the expert witnesses are divided sharply on accused's mental condition and the issue of his responsibility for the offense. However, there are certain matters upon which they agree. Some five or more civilian psychiatrists and six or more military psychiatrists have participated in this case and they are unanimous in the conclusion that, regardless of the nature of accused's illness, he is dangerous to society, will remain so for many years, and should not be released from confinement unless there is clear and positive evidence of a major change for the better in his pathological and psychological processes. In addition, they agree that the accused suffers from some illness which may at times affect his mental processes. The military psychiatrists diagnose his condition as a character disorder, while most of the civilian experts arrive at the conclusion that he has psychotic episodes and that the killing probably occurred during one of those periods. Lastly, the experts agree that, regardless of how the illness is catalogued or characterized, it has existed for some time and it is a part of accused's lifelong pattern of behavior.

Headnote 5

It would serve no real purpose were I to set out the facts underlying the various conclusions reached by the experts. It is enough to say that those experts from the civilian community who testified or otherwise submitted their opinion are recognized as some of the outstanding psychiatrists in America, and they presented powerful reasons to justify their opinions that accused was insane at the time of the offense and not mentally responsible for the crime. On the other hand, military medical experts gave good reasons to support their unanimous conclusion that the accused, while suffering from a chronic, severe anti-social personality, with aggressive and sadistic trends, was sane at the time of the offense and legally responsible for its commission.

Our task would not be difficult if we were faced only with a dispute in the evidence or the inferences to be drawn therefrom, for if that were the gist of the controversy, we could solve the problem by merely saying that we do not have fact-finding powers, that two fact-finding agencies have resolved the issues against the accused, and that we are powerless to interfere. But we are faced with an instructional infirmity, and, in the light of the evidential posture of this case, I believe that deficiency is sufficient to undermine the findings of premeditated murder.

I agree that the law officer instructed the court-martial members that if, in the light of all evidence, they had a reasonable doubt the accused was mentally capable of entertaining the premeditated design to kill involved in the offense of premeditated murder, they must find him not guilty of that offense. Such language may be found within this cold record, but that is not the full story, for it was preceded by other instructions which must have had a tendency to becloud the issue and confuse the court members. Certainly, if that statement was fully and fairly understood by the court members to mean that accused's mental state, regardless of the diagnostic label, could

be considered in determining his mental capacity to premeditate, then I would concur with my associates. However, my perusal of the record forces me to conclude that the members of the court-martial were not told informatively how to consider a condition which, if the Government's witnesses were to be believed, might have prevented the accused from premeditating, but which would not, under their view, relieve the accused of criminal responsibility for the homicide. Very briefly, I will mention my reasons for that conclusion.

The instruction referred to in the Court's opinion is quoted as it appears in the record. It there appears on the page as a separate paragraph, but it was given immediately following an instruction on intoxication. The instruction on that subject deals with its effect on premeditation, but any reference to the effect which a mental condition less than insanity, such as a character or behavior disorder, as those conditions are defined in military publications, might have on that element are singularly missing. More to the point, the instructions on insanity, without some sort of additional explanation, would lead a court member to believe that the accused's mental condition could only be considered if it amounted to legal insanity, and then solely for the purpose of determining whether the accused was to be relieved of criminal responsibility for the principal offense and all included offenses.

In dealing with the issue of insanity, the law officer gave the usually accepted instructions previously found in military cases. He used the right and wrong test in conjunction with the irresistible impulse theory. In dealing with the ability to adhere to the right, he specifically informed the members of the court that before that hypothesis could be used, it was necessary that there be a total impairment of the ability to adhere to the right and that something less than that did not suffice to meet the standards of military law. In addition, he informed the court-martial members that an irresistible impulse must be an insane, irresistible impulse, that is, an irresistible impulse resulting from a disease of the mind as distinguished from moral insanity, for he said that moral insanity, strictly speaking, is not insanity at all. Furthermore, he continued on to say that, for practical purposes, inability to adhere to the right occurs only in psychotics and that a mere defect of character, willpower, or behavior, as manifested by ungovernable passion or otherwise, does not necessarily indicate a lack of mental responsibility, even though it may demonstrate a diminution or impairment of the ability to adhere to the right. This is all very well when discussing the question of whether the accused is to be absolved of all criminal responsibility, but the thrust of those instructions is away from any theory that something less than psychosis can be considered by the court for any purpose. If the court-martial members understood the instruction in the manner in which I have interpreted it, then they would have to conclude that if the accused was psychotic he could be found not guilty, but that any impairment of the mental processes which did not reach that level of severity could not be considered at all. If such was the case, then the accused was prejudiced for, while the record would support a finding that he was legally sane, the medical evidence is also clearly sufficient to support a finding that his mental condition prevented him from premeditating the commission of this senseless crime. Surely this man was placed by the evidence in a category such that his illness must be considered in its relationship to both criminal responsibility and to the element of premeditation. The first was covered adequately by the instructions, the second not really at all.

In the recent case of United States v Dunnahoe, 6 USCMA 745, 21 CMR 67, I set out the reasons why I believed that well-recognized conditions which are characterized by some psychiatrists as character disorders and others as mental defects or derangements could be considered by court-martial members for the purpose of determining whether they affected the mental processes of an accused to such an extent that he could not premeditate. In that case I was not prepared to say—nor do I at this

time believe—that these disorders should be permitted to exculpate a person for the commission of a crime, but I have reached the conclusion that so long as the record shows a fair probability that the condition of an accused's mind is affected by some illness, even though he is not psychotic, the court-martial members should be instructed that they may consider it in ascertaining whether he actually could or did premeditate.

It may well be that my views on this particular issue will not become part of military law, but if a fair trial is to be assured when the life of an accused is at stake, it is necessary that law officers inform court members in clear and unmistakable language that they may consider any evidence in the record which casts light on the issue of premeditation, and that that evidence should not be excluded from consideration merely because medical experts disagree over its diagnostic label.

I would return the record to The Judge Advocate General of the Army for reference to a board of review, either to affirm a finding of guilty of unpremeditated murder and an appropriate sentence, or to grant a rehearing.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1508

MAURICE SCHICK, Appellant

v.

GEORGE J. REED, Chairman of the United States Board of Parole, et al.

Appeal from the United States District Court for the District of Columbia

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Decided July 23, 1973

Caryl S. Coie, with whom *Robert W. Sayler* was on the brief, for appellant.

James W. Diehm, Assistant United St es Attorney, with whom *Harold H. Titus, Jr.*, United States Attorney, *John A. Terry*, and *Michael A. Katz*, Assistant United States Attorneys, were on the brief, for appellees.

Before: WILBUR K. MILLER, *Senior Circuit Judge*, and WRIGHT and ROBB, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROBB.

Dissenting opinion filed by *Circuit Judge* WRIGHT, at p. 7.

ROBB, *Circuit Judge:* In 1954 the appellant Schick, a master sergeant in the United States Army, was convicted by a court-martial of the premediated murder of an 8-year old girl, in violation of Article 118 of the Uniform Code of Military Justice. 10 U.S.C. § 918 (1970).[1] The court-martial sentenced Schick to death. In 1960 President Eisenhower commuted the sentence to a dishonorable discharge and imprisonment for life upon the express condition that Schick should "never have any rights, privileges, claims, or benefits arising under the parole and suspension or remission of sentence laws of the United States and the regulations promulgated thereunder governing Federal prisoners confined in any civilian or military penal institution (18 USC 4201 *et seq.*, 10 U.S.C. 3662 et seq., [sic] 10 USC 871, 874), or any acts amendatory or supplementary thereof." Schick was thereafter committed to the custody of the Attorney General and is now confined in the United States Penitentiary at Lewisburg, Pennsylvania. The United States Board of Parole has declined to consider him for parole although in the absence of the condition attached to the President's commutation he would be eligible for such consideration. *See* 18 U.S.C. § 4202; 10 U.S.C. § 858 (1970).

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[1] Article 118 (now, 10 U.S.C. § 918) reads:

> Any person subject to this code who, without justification or excuse, unlawfully kills a human being, when he –
>
> (1) has a premediated design to kill;
>
> • • • •
>
> shall suffer death or imprisonment for life as a court-martial may direct. May 5, 1950, ch. 169 § 1 (Art. 118), 64 Stat. 140.

Schick filed this action in the District Court, seeking a declaration of his eligibility for consideration for parole pursuant to 18 U.S.C. § 4202, and an order directing the members of the Board promptly to consider him for parole. The District Court granted the defendants' motion for summary judgment upon the ground "that the conditional commutation of plaintiff's sentence was the result of the exercise by the President of his powers under Article II of the Constitution to grant reprieves and pardons for offenses against the United States, and of his autority as Commander in Chief of the Armed Forces and under the provisions of the Uniform Code of Military Justice". Schick appeals. We affirm.

In commuting Schick's sentence the President exercised the authority conferred upon him by Article II, section 2, clause 1 of the Constitution, providing that the President "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." That power includes the authority to commute a sentence of death to imprisonment for life. *Biddle v. Perovich*, 274 U.S. 480 (1927). Moreover, it is settled that a pardon or a commutation of a sentence may be granted on condition. *Ex parte Grossman*, 267 U.S. 87, 120 (1925); *Semmes v. United States*, 91 U.S. 21, 27 (1875); *United States v. Klein*, 13 Wall. (80 U.S.) 128, 142, (1871); *Ex parte Wells*, 18 How. (59 U.S.) 307 (1855); *Stroud v. Johnston*, 139 F.2d 171, 172 (9th Cir. 1943), *cert. denied*, 321 U.S. 796 (1944). The appellant contends, nevertheless, that the condition imposed in this case is illegal and invalid, since it contravenes the statute providing that a prisoner shall be eligible for parole after serving fifteen years of a life sentence. 18 U.S.C. § 4202 (1970).

The courts have state many times that Congress cannot control or regulate the action of the President in granting pardons or commutations. *See Ex parte Grossman, supra; The Laura*, 114 U.S. 411, 414 (1885); *Ex parte Garland*, 4 Wall.

(71 U.S.) 333, 380 (1866); *Yelvington v. Presidential Pardon & Parole Attorneys*, 94 U.S. App. D.C. 2, 4, 211 F.2d 642, 644 (1954); *Thompson v. Duehay*, 217 F. 484, 487 (D.C.W.D. Wash. 1914), *aff'd*, 223 F. 305 (9th Cir. 1915). Had Congress attempted to fetter the Presidential power by the parole statute a constitutional question might be presented. We think it clear however that Congress had no intention of interfering with the President's authority, and has not done so. This appears from the history of the parole statute itself, noted by the Attorney General in his opinion, *Pardoning Power of the President*, 41 OP. ATT'Y GEN. 251, 255 (1955). The Attorney General said:

> As enacted in 1910, section 10 [of the parole statute] provided that nothing in the act "shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case." 36 Stat. 821, 18 U.S.C. (1946 ed.) 723. This provision does not appear in the 1948 revision of title 18 of the U.S. Code, and the Reviser's Note to section 3570 of that title, dealing with Presidential remission of a sentence, states that the word "pardon" was omitted "as unnecessary in view of the pardoning power of the President under Const. Art. 2, § 2, cl. 1. 'This power of the President is not subject to legislative control.' *Ex parte Garland*, 1866, 4 Wall. 380."

Turning to the Uniform Code of Military Justice, Art. 71(a), 10 U.S.C. § 871(a), in force at the time of Schick's sentence, we find this provision:

> No court-martial sentence extending to death or involving a general or flag officer *shall be executed until approved by the President. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit*, and may suspend the execution of the sentence or any part of the sentence, *as approved by him*, except a death sentence. (Emphasis added). 64 Stat. 131.

The Uniform Code of Military Justice further provided, Art. 76, (now 10 U.S.C. § 876):

> The appellate review of records of trial provided by this code, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this code . . . shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in article 73 and to action by the Secretary of a Department as provided in article 74, *and the authority of the President.* (Emphasis added). 64 Stat. 132-33.

From the unambiguous language of these statutes it is apparent that Congress intended to, and did, preserve fully the commutation powers of the President by permitting him to "approve * * * such * * * commuted form of [a] sentence as he sees fit." It is also apparent that Congress intended that the action of the President, in the exercise of those powers, should be final, conclusive and binding upon all departments, courts, agencies and officers of the United States. In short, the President's action in this case was not inconsistent with the wishes of Congress as expressed in the parole statute.

Our conclusion on this branch of the case is in accord with the opinion of the Attorney General expressed in *Pardoning Power of the President, supra,* and with the decisions of the Supreme Court of California in *Green v. Gordon,* 39 Cal. 2d 230, 246 P.2d 38, *cert. denied,* 344 U.S. 886 (1952); and *Ex parte Collie,* 38 Cal. 2d 396, 240 P.2d 275 (1952), *cert. denied,* 345 U.S. 1000 (1953). A like result was reached by the Circuit Court of Appeals for the Tenth Circuit in *Hurt v. Moseley,* No. 71-1307, decided in an unreported opinion September 13, 1971.

The appellant argues that confinement without the possibility of parole is cruel and unusual punishment. We think there is nothing to this contention. "By common understanding imprisonment for life is a less penalty than

death." *Biddle v. Perovich,* 274 U.S. 480, 486 (1927), (Holmes, J.). In light of the atrocious nature of Schick's offense the commuted sentence is not out of proportion to his crime. We note further that the federal narcotics statute which precluded the possibility of parole in certain cases, 26 U.S.C. § 7237, was repeatedly upheld against attack on Eighth Amendment grounds. See for example, *United States v. Williams,* 143 U.S. App. D.C. 16, 442 F.2d 738 (1970); *United States v. Lozaw,* 427 F.2d 911 (2d Cir. 1970). This statute applied even in the cases of prisoners sentenced to serve as much as forty years. We also reject the contention that the commuted sentence denies the appellant the equal protection of the laws. Schick is in no worse position than others of his class who were convicted by a court-martial of premeditated murder and sentenced to death during a period when the death penalty was being enforced.

A contention not made in the appellant's brief, but advanced at oral argument, is based upon the decision of the Supreme Court in *Furman v. Georgia,* 408 U.S. 238 (1972). The argument runs as follows: *Furman v. Georgia* means that the provision for the death penalty in Article 118, UCMJ, 10 U.S.C. § 918 is invalid. Had this been the law at the time Schick was sentenced, he could have been sentenced only to imprisonment for life. 10 U.S.C. § 918. He then would have been committed to a United States Disciplinary Barracks or to a Federal Penitentiary. 10 U.S.C. §§ 858, 3661. In either event he would now be eligible to be considered for parole. 10 U.S.C. § 3663; 18 U.S.C. § 4202.

Had Schick been under a death sentence when *Furman v. Georgia* was decided that ruling would have required the excision of the constitutionally invalid sentence. *Robinson v. Neil,* ____ U.S. ____, 41 U.S.L.W. 4164, 4165 (January 16, 1973). The flaw in Schick's argument is that when the *Furman* case was decided he was not under a death sentence,

and there was therefore nothing to excise. Indeed, as a matter of law, a final and effective sentence of death was never imposed upon Schick. Unlike the judgment and sentence of a court, the sentence imposed by the court-martial was not effective until approved by the President, whose action was by statute made a part of the sentencing process. *See* Article 71(a) UCMJ, 10 U.S.C. § 871 (a). The President did not approve the sentence.

Finally, we are mindful that a pardon or commutation "is a part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed." *Biddle v. Perovich*, 274 U.S. 480, 486 (1927). Such an action of the President, explicitly authorized by the Constitution and exercised in a lawful and proper manner, may not be reviewed by a court, and is not to be undone twelve years later upon the basis of *ex post facto* hypothesis and rationalization. *See Ex parte Grossman*, 267 U.S. 87, 121-22 (1924).

. . The judgment of the District Court is affirmed.

WRIGHT, *Circuit Judge, dissenting*: The United States Board of Parole has refused to consider appellant for parole because the commuted sentence imposed by President Eisenhower includes a "no parole" condition. The sole issue presented is whether this condition is lawful. We are not asked to release appellant, but simply to order the Board to consider his parole application under the same standards as those governing all other federal prisoners.

Appellant brought this action and the District Court considered and decided the case prior to the Supreme Court's decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972). The case therefore proceeded under the assumption that the death

penalty initially imposed by the court-martial was valid. Although the President has unquestioned power under the Constitution to commute a death sentence, appellant argued that he lacked power to impose a "no parole" condition. As the majority opinion here indicates, the District Court, with good reason, rejected this argument.

But the matter does not end there. While this case was pending on appeal, the Supreme Court issued its decision in *Furman*, holding that "the imposition and carrying out of the death penalty" constitutes cruel and unusual punishment in violation of the Eighth Amendment. The Supreme Court, to paraphrase its own words, "has not hesitated" to apply *Furman* retrospectively, without regard to the criteria normally considered in deciding whether to give retrospective effect to a new constitutional rule. *Robinson* v. *Neil*, 409 U.S. 505, 508 (1973). *See, e.g., Stewart* v. *Massachusetts*, 408 U.S. 845 (1972); *Marks* v. *Louisiana*, 408 U.S. 933 (1972). In my view, retrospective application of *Furman* to appellant's case requires us to vacate the death sentence imposed by the court-martial and substitute the only other sentence which lawfully could have been imposed—life imprisonment with the possibility of parole.

I

Although the *Furman* decision itself simply remanded the death penalty cases for further proceedings without spelling out the nature of those proceedings, all courts considering the issue have recognized that retroactive application of *Furman* to any given prisoner requires that the death sentence be vacated and the judgment modified to provide for the appropriate alternative punishment specified by statute for the crime for which the prisoner was sentenced to death. *See Anderson* v. *State*, ___ Fla. ___, ___, 267 So.2d 8,9 (1972); *In re Baker*, ___ Fla. ___, ___ 267 So.2d 331, 332

(1972); *Huggins* v. *Commonwealth*, 213 Va. 327, 191 S.E.2d 734 (1972); *Sullivan* v. *State*, 229 Ga. 731, 194 S.E.2d 410 (1972). *See also People* v. *Anderson*, 6 Cal.3d 628, 657 n.45, 100 Cal. Rptr. 152, 171 n.45, 493 P.2d 880, 899-900 n.45 (1972). Where there is but one statutory alternative–for example, life imprisonment–that alternative must be imposed. *See People* v. *Anderson*, *supra*. Where the alternative sentence is discretionary–for example, rape statutes where the alternative to the death sentence is imprisonment for life or for any term of years within the discretion of the court–the case must be remanded to the sentencing court for resentencing. *See Anderson* v. *State*, *supra*, 267 So.2d at 10; *Huggins* v. *Commonwealth*, *supra*. *Cf. Sullivan* v. *State*, *supra*. In other words, the court's role after *Furman* is to ensure that the prisoner be treated as if the death sentence was not an available sentence at the time of the original sentencing.[1]

Application of this rule to appellant's case is quite simple. Article 118 of the Uniform Code of Military Justice, 10 U.S.C. § 918 (1970), under which appellant was convicted of premeditated murder, provides that one so convicted "shall

[1] *See also Sullivan* v. *State*, 229 Ga. 731, ___ 194 S.E.2d 410, 412 (1972) (Jordan, J., concurring specially): "[T]he life sentence now to be imposed * * * shall be subject to all laws and regulations applicable to such sentence as if it had been rendered on the date of the original sentence." It has been assumed that prisoners whose sentences were changed from death to life imprisonment pursuant to *Furman* would become eligible for parole. Thus the legislature of the State of Florida enacted special legislation after *Furman* purporting to require substitution of a life sentence without parole for those sentenced to death prior to *Furman*. *See Anderson* v. *State*, ___ Fla. ___, ___, 267 So.2d 8, 9 (1972). As the Supreme Court of Florida recognized, this statute raised constitutional problems which the court avoided by resentencing prisoners to life imprisonment prior to the effective date of the new statute. *See In re Baker*, ___ Fla. ___, ___ ___, 267 So.2d 331, 334-335 (1972).

suffer death or imprisonment for life as a court-martial may direct." A sentence of death was imposed by the court-martial, and its decision was affirmed by both the Board of Review and the United States Court of Military Appeals. Under *Furman* the death sentence so imposed was unconstitutional and therefore null and void. The only lawful alternative at the time of the original sentencing was a sentence of "imprisonment for life." That sentence must now be substituted for the original death sentence, and appellant must be treated as if he were sentenced to life imprisonment on the date of his original sentence.

Pursuant to statute, all persons sentenced to imprisonment for life by a court-martial eventually become eligible to be considered for parole, there being no statutory authority for a life sentence without parole. If the prisoner is confined in the United States Disciplinary Barracks, his parole opportunities are governed by the parole authority granted the Secretary of the Army, *see* 10 U.S.C. §§ 952-953 (1970), and the regulations promulgated pursuant thereto, and he becomes eligible to be considered for parole after serving 10 years of his sentence. *See* HEADQUARTERS, DEPARTMENT OF THE ARMY, Army Regulation 190-26, ch. 1, ¶ 1-4(a)(2) (March 20, 1972). If the prisoner is transferred to a federal penitentiary, his parole opportunities are governed by the same statutes and regulations as are applicable to all other federal prisoners, *see* 10 U.S.C. § 858 (1970), and he becomes eligible to be considered for parole after serving 15 years of his sentence. *See* 18 U.S.C. §§ 4202-4203 (1970). Since appellant has been imprisoned since 1954, he would now be eligible to be considered for parole under either eventuality.

Applying *Furman* retroactively in this manner, the commutation and condition imposed by President Eisenhower are a nullity, as they were based on an illegal premise. When

appellant was sentenced, the options available to the sentencing court were death or life imprisonment with the possibility of parole. Since *Furman* retroactively strikes the death option, the life option with parole possibilities is retroactively imposed as of the date of sentencing. Any subsequent imposition of a sentence of life imprisonment without parole would, of course, increase appellant's sentence and thus would be beyond the President's constitutional authority to grant reprieves and pardons. *See Biddle* v. *Perovich*, 274 U.S. 480, 486 (1927); *Ex parte Wells*, 59 U.S. (18 How.) 307, 310 (1855).

II

The majority seeks to avoid this logic by noting that appellant was not under a death sentence at the time *Furman* was decided. But this misconstrues both the *Furman* decision itself and the doctrine of retroactivity. *Furman* did more than stop executions, though of course that was its most dramatic effect. Not only did the Court say that the "carrying out" of the death penalty is unconstitutional, but it also expressly held, in language we must assume was carefully chosen, that "the *imposition* * * * of the death penalty * * * constitutes cruel and unusual punishment * * *." 408 U.S. at 239-240. (Emphasis added.) Because *Furman* is totally retroactive, a death sentence imposed before *Furman* is an illegal sentence. And those who were sentenced to death prior to *Furman* not only cannot have their sentences executed; they must be resentenced with a lawful sentence.

Nor is it significant that appellant is not now subject to a death sentence, since he is clearly suffering adverse consequences from the prior imposition of an illegal death sentence. Where a new constitutional rule is fully retroactive, the courts must do more than amend the direct consequences of prior violations of the rule. In addition, they must root out

as much as possible the adverse, albeit indirect, legal consequences of such prior violations.

A good example of this process may be seen in the Supreme Court's decisions concerning the right to counsel in state felony trials. That right, recognized in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), was held wholly retroactive in *Pickelsimer* v. *Wainwright*, 375 U.S. 2 (1963) (direct appeal), and *Kitchens* v. *Smith*, 401 U.S. 847 (1971) (*habeas corpus*). These cases remedied the direct consequences of prior violations of the right to counsel by overruling felony convictions obtained without counsel. But the retroactivity doctrine extended much further to embrace indirect adverse consequences stemming from prior violations of the right to counsel. In *Burgett* v. *Texas*, 389 U.S. 109 (1967), for example, the Court held that an uncounselled felony conviction obtained prior to *Gideon* could not be used to "enhance punishment" for a subsequent offense through operation of a recidivist statute. Under any other rule, the Court noted, "the accused in effect suffers anew" from the pre-*Gideon* deprivation of his right to counsel. 389 U.S. at 115. Similarly, only recently the Court held in *Loper* v. *Beto*, 405 U.S. 473 (1972), that an uncounselled conviction obtained prior to *Gideon* could not be used to impeach a defendant's credibility, again noting that the defendant had "suffered anew" from the pre-*Gideon* violation. 473 U.S. at 484.

The present case thus falls squarely within normal concepts of retroactivity. Although appellant is not now under a death sentence, he has suffered and continues to suffer enhanced punishment–the loss of his statutory right to be considered for parole–as a result of an illegally imposed death sentence.

Further guidance may be found in *Jones* v. *Cunningham*, 371 U.S. 236 (1963), which held that a petitioner could

maintain a *habeas corpus* action challenging his conviction even though his punishment had been alleviated by his being placed on parole. The rationale of that decision was that the petitioner still suffered certain restraints from the underlying conviction, albeit fewer restraints than incarceration. So here, appellant should be permitted to attack his death sentence, even though it has been ameliorated by presidential pardon, because he is still suffering restraints from the underlying illegal sentence.

It is also important to note that appellant's commuted sentence shares many of the evils of the original death sentence. Like the death sentence, imprisonment for life without the possibility of parole is inconsistent with the principle that the "rehabilitation of the convict [is] a basic purpose of criminal justice." *Furman* v. *Georgia*, *supra*, 408 U.S. at 306 (Mr. Justice Stewart, concurring). *See also id.* at 343 (Mr. Justice Marshall, concurring); *Weems* v. *United States*, 217 U.S. 349, 381 (1910). While I agree that the nonrehabilitative nature of life imprisonment without parole is not sufficient to declare that penalty itself cruel and unusual, the relationship it bears to the death penalty certainly has significance for the retroactive application of *Furman* to this case. For in delimiting its retroactive scope, one must keep in mind the evil sought to be remedied by a new constitutional rule. *Compare Tehan* v. *Shott*, 382 U.S. 406 (1966), *with Burgett* v. *Texas*, *supra*.

As indicated earlier, there is no provision in federal law–civilian or military–for a sentence of life imprisonment without parole. Neither a court-martial nor a judge can impose such a sentence. Congress has ensured that the primary focus of the federal penal system is rehabilitative, looking toward the day when the prisoner can return to

society.[2] The death penalty was a glaring exception, and it has now been held illegal. But the same nonrehabilitative exception lives on in muted form in the sentence appellant is now serving.

III

I confess a certain difficulty in comprehending the majority's argument that a sentence of death was never really imposed on appellant because, under the governing statute, the sentence could not be executed until approved by the President. As the majority properly notes elsewhere, the President's power to grant commutations is a constitutional, not a statutory, power. The President can pardon any conviction for an offense against the United States, whether or not authority to do so is granted by statute. Article 71(a), 10 U.S.C. § 871(a) (1970), which provides that no sentence of death can be executed before approved by the President, simply changes the procedure whereby pardons are granted; it does not affect the substance of the President's pardoning power. In a civilian death penalty case, the prisoner bears the burden of bringing his case to the President's attention for purposes of a commutation. In military death penalty cases, however, the Government was assigned the burden of having a death penalty affirmatively approved. The power of the

[2] Indeed, the principle of parole was recognized in the military long before parole became available for civilian prisoners. The Act of March 3, 1873, ch. 249, § 6, 17 STAT. 583, a direct predecessor of the current military parole statute, provided: "[The commandant of the military prison] shall take note and make record of the good conduct of the convicts, and shall shorten the daily time of hard labor for those who, by their obedience, honesty, industry, or general good conduct, earn such favors; and the Secretary of War is authorized and directed to remit, in part, the sentences of such convicts, and to give them an honorable restoration to duty in case the same is merited * * *." The first parole statute for civilian prisoners was the Act of June 25, 1910, ch. 387, 36 STAT 819.

President in both cases is the same, the only difference being the allocation between the prisoner and the Government of the burden of going forward to invoke that power. A sentence of death by a court-martial is every bit as final and effective a sentence of death as one imposed by a civilian court.

Rather than support the majority, Article 71(a) demonstrates that the commuted sentence is integrally related to the original death sentence imposed by the court-martial. As the language of Article 71(a) suggests, the sentence approved by the President is not a new sentence, but is simply a "commuted form of the sentence" imposed by the court-martial. It has no basis in law except as such, and is therefore no more lawful than the illegal sentence itself.

It is argued that we should not apply *Furman* retroactively in the manner suggested because to do so amounts to review by a court of the President's exercise of his constitutional power to grant pardons and reprieves. But to apply *Furman* retroactively to appellant in no way indicates any disapproval by this court of the manner in which President Eisenhower exercised his powers of clemency. It was concededly reasonable for both the court-martial and the President not to have foreseen the *Furman* decision. They quite properly assumed that the death penalty was a lawful sentence. But as Mr. Justice Stewart indicated in *Loper v. Beto*, supra, 405 U.S. at 484:

> "* * * It would surely be unreasonable * * * to expect the judge at Loper's trial to have anticipated *Gideon*, just as it would have been unreasonable to have expected the judge at Gideon's trial to have foreseen our later decision in that case. But a necessary result of applying any decision retroactively is to invalidate rulings made by trial judges that were correct under the law prevailing at the time the judges made them. * * *"

(Footnote omitted.) So here, our substitution of life imprisonment with the possibility of parole for the death

sentence as commuted by the President does not disparage in any way the President's exercise of his pardoning power. Rather it simply reflects the fact that a retroactive change in the law has been made.

With all due respect, the majority's refusal to follow the Supreme Court's dictate and treat *Furman* as totally retroactive seems to represent disagreement with the concept of retroactivity itself. It is suggested that decisions made on the basis of rules then assumed valid are "not to be undone twelve years later upon the basis of *ex post facto* hypothesis and rationalization." But the precedents will not tolerate this disparaging view of retroactive application of new constitutional rules. Was it "*ex post facto* hypothesis and rationalization" when the Supreme Court ruled that the petitioner in *Kitchens* v. *Smith*, *supra*, who had been convicted without counsel some 19 years before *Gideon* v. *Wainwright*, was entitled to release as a result of that decision?

There are all too many for whom the Supreme Court's opinion in *Furman* came too late. For them what is done is done. Even for appellant, retroactive application of *Furman* cannot erase the mental anguish he no doubt experienced during the six years he waited on death row from the time he was initially sentenced to die to the time of the President's commutation. But I can see no reason for not alleviating those effects of the illegal death sentence imposed on appellant which can still be cured. The crime for which appellant was convicted was atrocious, as the majority notes, though the strong evidence of mental illness as a cause of the crime must temper that observation.[3] Under the law,

[3] The facts of the case were that after a chance encounter and a 10-minute conversation appellant simply grabbed his 8-year-old victim and choked her. There was no evidence of a sexual assault. In his confession to the authorities appellant stated he "just had an uncontrollable urge to kill her" and had done so "just because she was there." [continued]

however, even murderers sentenced to life imprisonment are eligible for parole if they can satisfy the Board of Parole that "there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and • • • [that] such release is not incompatible with the welfare of society." 18 U.S.C. § 4203 (1970). In my judgment, *Furman* requires that appellant be given that chance.

I respectfully dissent.

The sole defense raised at the court-martial related to the sanity issue. Four Army psychiatrists who had examined appellant in Japan found him legally responsible, but the two Japanese psychiatrists who were appointed to examine him disagreed. On appeal the Court of Military Appeals directed that appellant be transferred to the Menninger Clinic for further examination. All the psychiatrists who examined him there, including Dr. Menninger himself, concluded that mental illness was a cause of the killing. Evidently appellant had a lifelong history of mental illness manifested by periodic episodes of uncontrolled violence and psychotic behavior, and had been admitted for in-patient psychiatric hospitalization on 13 occasions during World War II. Indeed, during a temporary separation from the Army after 1946, he received disability benefits based in part on his psychiatric difficulties.

Although the reviewing authorities persisted in their affirmance of the court-martial's finding of responsibility, the record clearly shows that the strong evidence of mental illness played a crucial role in obtaining a presidential commutation.

MAY 30 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1973

No. 73-5677

MAURICE SCHICK,
Petitioner,

—v.—

GEORGE J. REED, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED OCTOBER 31, 1973
CERTIORARI GRANTED APRIL 22, 1974

IN THE

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No. 73-5677

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INDEX

	Page
Relevant Docket Entries	1
Opinion of the United States Army board of review, November 30, 1954	4
Opinion of the Court of Military Appeals, November 18, 1955	9
Opinion of the United States Army board of review on reconsideration, February 20, 1956	12
Opinion of the Court of Military Appeals, December 7, 1956	20
Commutation Action by the President, March 25, 1960	35
Complaint for Declaratory Relief and for Injunction or Relief in the Nature of Mandamus, filed April 19, 1971	36

	Page
Defendants' Motion to Dismiss or for Summary Judgment, filed September, 1971	38
Plaintiff's Opposition to Defendants' Motion, filed September 20, 1971	40
U.S. District Court Order Granting Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, November 9, 1971 (Hart, J.)	41
Appellant's Motion for Summary Reversal, filed December 8, 1971	42
Appellees' Motion for Summary Affirmance, filed December 28, 1971	48
U.S. Court of Appeals Order Summarily Reversing Order of the District Court, February 1, 1972 (Per Curiam)	56
District Court's Order Granting Defendants' Motion for Summary Judgment, March 29, 1972 (Hart, J.)	57
U.S. Court of Appeals Opinion Affirming the Judgment of the District Court (Robb, Miller, JJ.; Wright, J., dissenting)	59
Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari	75

RELEVANT DOCKET ENTRIES

Date	Proceedings
March 27, 1954	Petitioner convicted by general court-martial, Tokyo, Honshu, Japan of premeditated murder
May 10, 1954	Convening authority takes action approving finding and sentence
	CM 373479 before the Army Board of Review and the Court of Military Appeals (No. 6388 in the Court of Military Appeals)
Nov. 30, 1954	Army board of review Opinion affirming finding and sentence
Nov. 18, 1955	Court of Military Appeals remanded the case to the board of review for reconsideration of the question of the accused's sanity
Feb. 20, 1956	Board of review Opinion on reconsideration affirming finding and sentence
Dec. 7, 1956	Court of Military Appeals, by split decision, affirms board of review decision
July 22, 1957	Secretary of the Army's transmittal of record of trial to the President for action
March 25, 1960	President takes action approving finding of guilty and commuting sentence to life imprisonment on condition that petitioner never be considered for parole
April 13, 1960	Presidential action promulgated by General Court-Martial Order No. 5, Headquarters, Department of the Army
	Civ. Action No. 779-71 in the United States District Court for the District of Columbia
April 19, 1971	Complaint for declaratory relief and for injunction and relief in the nature of mandamus filed

Date	Proceedings
Sept., 1971	Defendants' motion to dismiss or for summary judgment filed
Sept., 1971	Defendants' memorandum of points and authorities filed
Sept. 20, 1971	Plaintiff's opposition to defendants' motion to dismiss or for summary judgment filed
Sept. 20, 1971	Plaintiff's motion for summary judgment filed
Nov. 9, 1971	Order that defendants' motion to dismiss be granted for lack of jurisdiction over the subject matter (Hart, J.)
Nov. 16, 1971	Plaintiff's motion for leave to appear *in forma pauperis* and for order that transcript be furnished at the expense of the United States
Nov. 30, 1971	Order granting plaintiff's motion (Hart, J.)
	No. 71-1994 in the United States Court of Appeals for the District of Columbia
Dec. 6, 1971	Plaintiff's notice of appeal filed
Dec. 8, 1971	Appellant's motion for summary reversal filed
Dec. 28, 1971	Appellees' motion for summary affirmance filed
Feb. 1, 1972	Per curiam order summarily reversing District Court Order and remanding case to the District Court with directions that the case be reinstated (Robinson and MacKinnon, JJ.)
	Civ. Action No. 779-71 in the United States District Court for the District of Columbia
March 29, 1972	Order granting defendants' motion for summary judgment (Hart, J.)

Date	Proceedings
May 5, 1972	Notice of appeal filed
	No. 72-1508 in the United States Court of Appeals for the District of Columbia
Aug. 28, 1972	Appellant's brief filed
Nov. 17, 1972	Appellee's brief filed
July 23, 1973	Opinion of the Court of Appeals affirming, by split decision, the judgment of the District Court (Robb, Miller, JJ.; Wright, J., dissenting)
Aug. 21, 1973	Appellant's petition for rehearing and suggestion for rehearing en banc filed
Oct. 1, 1973	Appellant's petition denied
	No. 73-5677 in the United States Supreme Court
Oct. 31, 1973	Petition for writ of certiorari filed
Nov. 12, 1973	Motion for leave to proceed *in forma pauperis* and supporting affidavit filed
March 28, 1974	Memorandum for respondents in opposition filed
April 12, 1974	Petitioner's supplemental brief filed
April 22, 1974	Order granting petition for writ of certiorari and motion for leave to proceed *in forma pauperis*

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

In the Board of Review, United States Army
Before
POTTER, GOEBEL and BERKOWITZ
Members

GM 373479

UNITED STATES

v.

Master Sergeant MAURICE L. SCHICK, RA 33 688 357,
Detachment Army Medical Service, United States Army
Hospital, 8169th Army Unit, APO 50

CENTRAL COMMAND

Sentence adjudged 27 March 1954
Approved sentence: To be put to death

Appellate Counsel for the Accused:

WILLIAM C. DAVALLE, ESQUIRE
Lieutenant Colonel HARLEY A. LANNING, JAGC

Appellate Counsel for the United States:

Major MERLE C. RIDEOUT, JR., JAGC

DECISION

The accused was charged with premeditated murder, in violation of Article 118 of the Uniform Code of Military Justice. He pleaded not guilty to the specification and the charge. He was found guilty of both and was sentenced to be put to death. The convening authority approved the sentence. No previous convictions were considered by the court.

The offense occurred at Sagamihara, a dependent housing project, near Camp Zama, Tokyo, Honshu, Japan, on 21 November 1953. The victim was Susan, the eight year old daughter of Colonel and Mrs. Jacquard H. Rothschild, an Army officer assigned to Army Forces Far East.

The evidence adduced by the prosecution establishes that on the afternoon of 21 November 1953 Susan visited with the daughter of Sergeant Clark W. Overton, who lived on the reservation in quarters 148-c. Later in the afternoon at about 1705 hours, she left Sergeant Overton's quarters riding her bicycle towards home. She rode easterly in the direction of a path running generally east and west across the area. This path was frequently used by the children in order to avoid the traffic on the roads. She was wearing a green polka-dot dress, a western style jacket and a white handkerchief, or scarf, on her hair.

At about the same time Susan started for home a soldier entered the area at Gate #2, asked the gate guard the time and proceeded westwardly along the path.

When Susan did not return home her father called Sergeant Overton inquiring if she was still at his home. When told that she had left, Colonel Rothschild asked Sergeant Overton to help him search for the little girl.

A short time later Colonel Rothschild found Susan's body lying face downward under water in a moat which runs parallel to the path. She had been gagged with her panties and the lower portion of her torso was bare. Her shoes were found nearby on the path. Her bicycle, facing eastward, was still leaning on its rest at a place about 8 feet south of the path and about 25 feet from where her shoes were found. Susan's white scarf was found on the path about four feet from her bicycle.

A medical examination, made soon after the discovery of the body, established that there were bruise marks and abrasions about Susan's neck, some swelling of her eyelids and blood in her trachea. An autopsy established

that there was an increased amount of blood in most of the organs, particularly in the lungs and brain and a swelling in the voice box, trachea and lungs. The cause of death was established as asphyxia due to strangulation or possibly drowning.

After the prosecution had established the corpus delicti by competent evidence the signed pretrial statement of the accused was admitted into evidence as Prosecution's Exhibit #1 (R 237), without objection by defense counsel. Without going into details of the offense, it is sufficient to state that the accused admitted killing Susan by choking her and by placing her face down in the moat and by holding her head under water with his foot. Defense submitted no evidence on the merits of the case (R 240).

Defense raised the question of the mental capacity of the accused and prior to the submission of the case on its merits made various motions for continuances to permit psychiatric examination of the accused by civilian psychiatrists. After overruling a motion for an indefinite delay, the law officer granted a continuance for the purpose of having accused examined by two qualified Japanese civilian psychiatrists. Prior to trial, a board of Army psychiatrist had been convened to examine and to determine the mental status of the accused.

The record of trial is replete with evidence concerning accused's mental responsibility at the time of the commission of the offense and at the time of trial. Suffice it to say that the Japanese doctors determined that accused was psychotic, either epileptic or schizophrenic (R 71) and that he was unable to distinguish right from wrong or to adhere to the right (R 69). The board of Army psychiatrists, on the other hand, diagnosed the accused as follows: Antisocial personality, chronic severe, with aggressive and sadistic tendencies, manifested by life-long disciplinary difficulties, inability to profit from experience, absence of real loyalties to persons, groups or codes, and in this case by egocentricity, grandiosity, a desire for omnipotence, impulsive aggressive outbursts, excessive indulgence in alcohol, and a tendency to make and act upon his own laws (R 125-156, 163).

The board members further determined that at the time of the commission of the offense, he could differentiate between right and wrong, could adhere to the right and that at the time of the trial he could understand the nature of the proceedings against him and intelligently conduct or cooperate in his own defense (R 126, 157, 164).

Prior to filing an assignment of errors, the civilian appellate defense counsel and the military appellate counsel filed with the board of review a motion requesting the board to direct that the accused be transported from Japan to the United States for further psychiatric examination. Subsequent to the filing of this motion defense counsel filed their assignment of errors.

Civilian defense counsel argued both the motion and the errors set forth in the assignment of errors at the same hearing before the board of review. He requested, that, as an alternative to the motion to return the accused for further psychiatric tests, the board of review forward the record of trial, containing the testimony of all the psychiatrists who examined the accused to the Surgeon General of the Army for an opinion concerning the mental responsibility of the accused. Pursuant to this request and in accordance with paragraph 124, *Manual for Courts-Martial, United States, 1951*, and Rule IX f 3 of the Uniform Rules of Procedure in and before the Boards of Review, the board forwarded the allied papers and the record of trial to the Surgeon General of the Army who subsequently returned the documents to the board of review stating that in his opinion

> "a. The accused was at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged to distinguish right from wrong.
>
> "b. The accused was at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged to adhere to the right.
>
> "c. The accused at the time of trial did possess sufficient mental capacity to understand the nature

of the proceedings against him and intelligently to conduct or cooperate in his defense.

"d. There is no indication in the available record that the accused does not at the present time possess sufficient mental capacity to understand the nature of the appellate proceedings in this case and intelligently to cooperate in his defense."

The instructions of the law officer concerning the elements of the offense charged and on the issue of the sanity were correct. The lesser included offenses were submitted to the court-martial under full, complete and appropriate instructions. The factual situation was decided by the court-martial adversely to the accused. There appears to be nothing of record to merit disturbing the finding and sentence of the court.

The board of review has given careful consideration to the assignment of errors filed by the appellate defense counsel and has heard extended oral argument in support thereof. The assignment of errors is considered without merit. The finding of guilty and the sentence are supported by the competent evidence of record.

For the reasons stated above the board of review finds the approved finding of guilty and the sentence correct in law and in fact and having determined on the basis of the entire record that they should be approved, the same are hereby

Affirmed.

COURT OF MILITARY APPEALS

UNITED STATES, APPELLEE

v.

MAURICE L. SCHICK, Master Sergeant, U. S. Army, APPELLANT

6 USCMA 493, 20 CMR 209

No. 6388

Decided November 18, 1955

On mandatory review. CM 373479, not reported below. Remanded.

William C. DuValle, Esq., argued the cause for Appellant, Accused. With him on the brief were *Lieutenant Colonel James M. Scott* and *Lieutenant Colonel Harley A. Lanning.*

Major Merle C. Rideout, Jr., argued the cause for Appellee, United States. With him on the brief was *Lieutenant Colonel Thomas J. Newton.*

OPINION OF THE COURT

ROBERT E. QUINN, Chief Judge:

A general court-martial in Tokyo, Japan, tried, convicted, and sentenced the accused to death for the premeditated murder of eight-year-old Susan Rothschild. Intermediate appellate authorities affirmed the accused's conviction and sentence, and the case was forwarded to this Court for review. Article 67(*b*)(1), 50 USC § 654.

After the appeal was assigned for argument in this Court, appellate defense counsel moved to remand the case to the board of review, or, in the alternative, for a continuance, for the purpose of obtaining a psychiatric

examination of the accused by a civilian psychiatrist. We granted a continuance and directed that the findings of the psychiatrist be reported to this Court.

A team of staff psychiatrists and psychologists of the Menninger Clinic examined the accused. Their report says that, in their opinion, the accused was unable to adhere to the right with regard to the offenses charged at the time he committed the crime. They also indicate that they consider the accused "at this time, permanently and incurably ill."

Once an accused has had a fair opportunity at the trial level to litigate the issue of his mental responsibility for an offense and his capacity to stand trial, those issues should, on appeal, be accorded the same treatment as all other contested matters. We mean that the question should not be tried *de novo* at every appellate level. A day in court means one fair and just trial of contested issues, and, when that has been granted to an accused, he does not have a right to a second trial in an appellate forum.

The unusual circumstances here which prompt us to permit further consideration of accused's sanity merit enumeration. This accused has been sentenced to death for the commission of an atrocious crime. He was tried in Japan where the only civilian medical experts available to him were Japanese. One of the psychiatrists was obliged to testify through an interpreter, and, thus, he may have labored under a rather severe handicap in his ability to convey his findings to the court-martial. Both medical witnesses had a minimum of time to conduct their examinations, and they indicate that during the trial they were handicapped in the development of the bases for their conclusions.

In view of the Menninger report, and the circumstances set out above, we remand the case to the board of review for reconsideration of the question of the accused's sanity. United States v. Bell, 6 USCMA 392, 20 CMR 108; United States v. Washington, 6 USCMA 114, 19 CMR 240. The board of review will evaluate that report in conjunction with the evidence in the record and with such other psychiatric evidence as it may obtain in an investigation of its own if it considers such investigation necessary or desirable. United States v. Burns, 2 USCMA 400, 406, 9 CMR 30. In taking this action we are not holding out to accused persons the hope that this Court will require boards of review to become trial forums. Only when a situation is as unusual as this can we be asked to exercise our discretion.

A procedural matter of some significance merits comment. This case reached the Court on mandatory review. As previously noted, appellate defense counsel moved to remand the case to a board of review or, in the alternative, for a continuance until a psychiatric examination could be made and a report filed in this Court. This prayer for relief was unusual. We entertained the motion because of the special circumstances earlier enumerated, and we granted a continuance. After the psychiatric report was received by the Court, the issue was set down for oral argument. Counsel for both parties appeared and in open court indicated that they were prepared to and would argue both the motion to remand and the errors raised on appeal. They were permitted to do so. Consequently, if this case again reaches this Court, no additional arguments will be heard, unless it clearly appears that questions are raised by the decision of the board of review which were not in issue at the time of argument.

To avoid any possible misunderstanding, it should be understood by the board of review that our reference to unusual circumstances is for the purpose of emphasizing that this case is *sui generis*. We express absolutely no opinion on the merits of the accused's defense of insanity. The board of review should consider the entire record, including the recently submitted report, uninfluenced by any proceeding before this Court, or by the procedure directed by us. The responsibility for making appropriate factual findings rests solely with the members of the board of review.

Judges LATIMER and BROSMAN concur.

UNITED STATES ARMY BOARD OF REVIEW

UNITED STATES

v.

Master Sergeant MAURICE L. SCHICK, RA 33688357, Detachment Army Medical Service, United States Army Hospital, 8169th Army Unit, APO 50

CM 373479 (recon)*

Sentence adjudged 27 March 1954. Approved sentence: To be put to death.

Appearances: Mr. William C. DuValle, Mr. Harlow M. Huckabee, Lieutenant Colonel James M. Scott, JAGC, appellate counsel for the accused; Captain M. Douglas Hodges, JAGC, appellate counsel for the United States.

DECISION ON RECONSIDERATION

Upon original review of the record of trial in the instant case the Board of Review by its decision dated 30 November 1954 affirmed the approved findings of guilty of premeditated murder, in violation of Article 118 of the Uniform Code of Military Justice, and approved the death sentence.

Since this case involves a sentence to death, a mandatory appeal was taken to the United States Court of Military Appeals. Article 67(*b*)(1), Uniform Code of Military Justice. Subsequent to the filing of the appeal and prior to argument on the merits, appellate defense counsel moved the Court to remand the case to the Board of Reivew, or, in the alternative, for a continuance for the purpose of obtaining a psychiatric examination of the accused by a civilian psychiatrist. The Court granted the continuance and directed that the findings of the psychiatrist be filed with the Court. In compliance with the order of the Court the accused was examined by psychiatrists and psychologists of the Menninger Clinic, who

* Original decision by board of review not reported below.

submitted their findings to the Court by a comprehensive report dated 19 August 1955. On 6 October 1955 arguments by counsel were heard and the case was submitted to the Court.

By order dated 30 November 1955, the United States Court of Military Appeals remanded the case to The Judge Advocate General of the Army for reference to the Board of Review for further review in accordance with the Court's opinion dated 18 November 1955 (United States v. Schick (No. 6388), 6 USCMA 493, 20 CMR 209). On 6 December 1955, The Judge Advocate General returned the case to the Board of Review for further action in accordance with the mandate of the Court. Subsequent to said reference, oral arguments by appellate defense and Government counsel on the question of the sanity of the accused were heard.

Pursuant to Rule IX F 3, Uniform Rules of Procedure for Proceedings In and Before Boards of Review, a Board of Review is empowered to consider matters outside the record of trial with respect to matters affecting the sanity of an accused tending to show that further inquiry as to his mental condition is warranted in the interest of justice. Consequently this board will receive and evaluate all matter concerning the mental responsibility of the accused obtained subsequent to the prior decision of this board.

The report of the Menninger Clinic concludes as follows:

> "A. The subject is suffering from a definite mental illness characterized by periodic episodes of uncontrolled violence and excitement, interspersed with periods in which he appears either normal or rebellious and anti-social to casual observers. Even in these non-violent periods, there is evidence of the underlying mental illness. In the American Psychiatric Association Standard Nomenclature currently in use, this illness would be classified as, Schizophrenic Reaction, chronic, undifferentiated type, manifested by episodes of transitory dereistic excitement, inappropriate emotional responses, extensive

inner fantasy life, perplexity and concern over mental illness, blurring of boundaries between fantasy and realty, impulsive aggressive behavior, with egocentricty and fantasies of omnipotence.

External Precipitating Stress: Unknown

Predisposition: Severe; lifelong pattern of antisocial behavior.

Degree of Impairment: Severe; requires hospitalization.

"B. The actual murder itself was senseless, from any rational point of view, but was related in many irrational ways to patient's pathological thinking and feeling. It was definitely a product of the illness and the culmination of the gradual decompensation of a chronically sick person.

"C. On the basis of our examination of the patient, a review of his history, and a study of his previous medical records, it seems clear he has a mental disease which deprived him completely of the power of choice and volition so that he was unable, concerning the particular act charged, to adhere to the right."

This report was forwarded to The Surgeon General of the Army for his opinion as to the accused's mental responsibility. His opinion, dated 9 January 1956, is as follows:

"3. After reconsideration of the records available on 12 November 1954 at the time of his first review and consideration of the new medical studies and opinions presented in the Menninger Clinic Report, Doctor Guttmacher's letter, and reports from the United States Disciplinary Barracks, Fort Leavenworth. The Surgeon General continues to concur in the diagnosis of a character and behavior disorder as set forth in the Board of Medical Officers convened at the United States Army Hospital, 8167th AU, APO 1055, San Francisco, California, dated 19 January 1954 and 6 February 1954. With particular reference to the questions asked in paragraph 3,

Comment No. 1, TJAG, 15 December 1955, The Surgeon General is of the following opinion:

a. The accused was at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged to distinguish right from wrong.

b. The accused was at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged to adhere to the right.

c. The accused at the time of trial did possess sufficient mental capacity to understand the nature of the proceedings against him and intelligently to conduct or cooperate in his defense.

d. There is no indication in the available record that the accused does not at the present time possess sufficient mental capacity to understand the nature of the appellate proceedings in this case and intelligently to cooperate in his defense."

Subsequently all of the reports and testimony herein referred to were submitted by appellate defense counsel to Dr. Winfred Overholser for his study and opinion. By a report dated 24 January 1956, he stated:

"However, even with all the psychiatric defects of the present 'tests,' it is my considered opinion that Schick is entitled to a verdict of acquittal by reason of insanity."

Our prior decision set forth the evidence at the trial level concerning the commission of the offense, the diagnosis of the Japanese doctors employed by the defense and the diagnosis of the Board of Army psychiatrists. The substance of the testimony of the Japanese doctors was that the accused was psychotic, either epileptic or schizophrenic, and that he was unable to distinguish right from wrong or to adhere to the right. The Army Board of psychiatrists' conclusions and diagnosis was that:

"(1) The clinical psychiatric diagnosis is antisocial personality.

"(2) The accused knew at the time of the alleged offense that the act was wrong.

"(3) The accused was able at the time of the alleged offense to adhere to the right.

"(4) His intelligence level is bright normal, with an intelligence quotient of 115.

"(5) He was not drunk at the time the alleged act was committed. He was drinking prior to that time but did so voluntarily. He is not a chronic alcoholic or a victim of an alcoholic psychosis. He did not have 'pathologic intoxication.'

"(6) He understands the nature and seriousness of the charges. He is mentally capable of cooperating in his own defense.

"(7) He was capable of forming the degree of intent, willfulness, malice and premeditation called for by the nature of the offense charged.

"It was the unanimous conclusion of the Sanity Board that the patient, M/Sgt Maurice L. Schick, is now, was in the past, and was at the time of the commission of the alleged offense, entirely sane, competent and responsible for his actions, able to differentiate between right and wrong, and able to adhere to the right. He has a history of life-long maladjustment, rebellion towards superiors, and resentment toward authority, all of which reflect poor interpersonal relationships in his family, resentment of his parents' restrictions and his eldest brother's superiorities, delinquent and non-conforming behavior, and on a number of occasions, incredibly antisocial homicidal acts. These latter have been consistently rationalized and justified in the patient's mind by invoking his own special set of moral standards. It is therefore true beyond any doubt that this man is abnormal. It is by the nature of our social organization abnormal to kill other members of the society except when one's own life is threatened or in some similar conventionally accepted situation Like any antisocial personality, this man, while grossly abnormal, is not insane. The difference does

not consist of a finely shaded definition. This patient was capable of forming an intent and of acting in a complex, carefully thought-out way on the basis of his intent. No profound change has occurred in his personality or character and no such change is likely to occur. He is therefore at this moment essentially the same as he was when he allegedly killed Susan Rothschild . . . . He is considered to be a menace to society and because his behavior is not the result of a transient personality disorder or a transient or curable mental disease, it is the considered opinion of this Board that he will throughout his life continue to be a menace to society. It is strongly recommended whatever the findings of the court in this case and whatever the sentence in the event of conviction, that steps be taken to segregate this man from society to prevent the repetition of his confessed homicidal acts. Since this man is not psychotic, he cannot be committed to an institution for the mentally ill."

On 2 November 1954 the record of trial and trial level phychiatric reports were submitted to The Surgeon General of the Army for his opinion as to the mental responsibility of the accused at the time of the commission of the offense and at the time of trial. He replied, on 12 November 1954, stating that he concurred in the diagnosis, findings, conclusions and recommendations of the Board of Medical Officers who had previously examined the accused.

The Menninger report, the latest opinion of The Surgeon General, including the inclosures thereto, and Dr. Overholser's opinion, dated 24 January 1956, is the only additional evidence not considered by the Board of Review in its original review of the record of trial and in arriving at its prior decision. This evidence is substantially the same as that considered and evaluated by the court-martial at the trial which was decided adversely to the accused.

The question now presented for consideration is whether the report of the Menninger Clinic and Dr. Over-

holser's opinion, when weighed and evaluated with the testimony of the witnesses at the trial, and the opinions of The Surgeon General, dated 12 November 1954 and 9 January 1956, are sufficient to raise a reasonable doubt in the minds of the members of the board as to the accused's sanity. It is the opinion of the Board of Review that the reports of the Menninger Clinic and Dr. Overholser disclose no essentially new facts not previously known to the court-martial, which as the finders of the facts saw and heard all the evidence, including that of the Japanese psychiatrists and the Army psychiatrists, and, under proper instructions from the law officer, resolved the issues against the accused.

The Board of Review is under no compulsion to accept the above reports as a matter of law. United States v. Kunak (No. 3787), 5 USCMA 346, 17 CMR 346. The United States Court of Military Appeals in that case said:

> ". . . While the evidence last obtained was contrary to other expert testimony in the record, we cannot say that the board of review was compelled to accept it as a matter of law . . . .
>
> ". . . The latest acquired evidence merely created a disputed question of fact which, under the provisions of the Code, the board was permitted to resolve. Its decision is not subject to reversal if there is substantial evidence to support it. . . ."

The Board of Review believes that the following statement from Holloway v. United States, 148 F2d 665 (App DC, 1945), cert den 334 US 852 (1948), 92 L ed 1774, 68 S Ct 1507, is apropos of this case:

> "And so it is that when psychiatrists attempt on the witness stand to reconcile the therapeutic standards of their own art with the moral judgment of the criminal law they become confused. Thus it is common to find groups of distinguished scientists of the mind testifying on both sides and in all directions with positiveness and conviction. This is not

> because they are unreliable or because those who testify on one side are more skillful or learned than those who testify on the other. It is rather because to the psychiatrist mental cases are a series of imperceptible gradations from the mild psychopath to the extreme psychotic, whereas criminal law allows for no gradations. It requires a final decisive moral judgment of the culpability of the accused. . . .
>
> ". . .
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> ". . . To justify a reversal circumstances must be such that the verdict shocks the conscience of the court." (p 667)

Consequently, pursuant to our power under the Uniform Code of Military Justice, Article 66(c), and in accordance with the order of the United States Court of Military Appeals, the board has considered reports of Doctors Menninger and Overholser concerning the accused's sanity and evaluated them in conjunction with the evidence of record, together with the latest opinion of The Surgeon General of the Army and has independently arrived at the same conclusion as the members of the court-martial, and finds that the accused was at the time of the offense and at the time of trial and is presently beyond a reasonable doubt mentally responsible for his acts.

For the reasons stated, upon reconsideration the Board of Review finds the findings of guilty and the sentence as approved by proper authority correct in law and fact and having determined on the basis of the entire record that they should be approved, the same are hereby

Affirmed.

GOEBEL, STEELE and BERKOWITZ, Judge Advocates. 20 February 1956.

COURT OF MILITARY APPEALS

UNITED STATES, APPELLEE

v.

MAURICE L. SCHICK, Master Sergeant,
U. S. Army, APPELLANT

7 USCMA 419, 22 CMR 209

No. 6388

Decided December 7, 1956

On mandatory review. CM 373479, original decision not reported below; decision on reconsideration reported below in 21 CMR 343. Affirmed.

William C. Duvalle, Esq., argued the cause for Appellant, Accused. With him on the brief were *Harlow M. Huckabee*, Esq., and *Lieutenant Colonel James M. Scott.*

Captain Thomas J. Nichols argued the cause for Appellee, United States. With him on the brief were *Lieutenant Colonel Thomas J. Newton, Major Merle C. Rideout* and *Captain M. Douglas Hodges.*

OPINION OF THE COURT

HOMER FERGUSON, Judge:

The accused was convicted by general court-martial of the premeditated murder of eight-year-old Susan Rothschild at Tokyo, Japan, in violation of Article 118, Uniform Code of Military Justice, 50 USC § 712. He was sentenced to death. On May 10, 1954, the sentence was approved by the convening authority. The board of review, by decision dated November 30, 1954, affirmed and approved the death sentence. A mandatory appeal, under Article 67(*b*)(1), of the Uniform Code of Military Justice, 50 USC § 654, was taken to this Court. After the appeal, and prior to argument on the merits, appellate

defense counsel moved to remand the case to the board of review, or, in the alternative, for a continuance for the purpose of obtaining a civilian psychiatric examination of the accused. This Court granted the continuance and directed that additional findings of the psychiatrist be filed with the Court. The accused was examined by psychiatrists and psychologists of the Menninger Clinic, who submitted their findings by a well-written and comprehensive report dated August 19, 1955. Arguments were heard by counsel on October 6, 1955, and the case was submitted to the Court. By an opinion decided on November 18, 1955 (6 USCMA 493, 20 CMR 209), the Court remanded the case to The Judge Advocate General of the Army for reference to the board of review for additional review with respect to a reconsideration of the accused's sanity. The case was returned to the board of review and oral arguments by the defense and Government counsel were heard on the question of sanity. By decision, dated February 20, 1956, the board of review again affirmed the findings and sentence. Following the final board of review decision the accused filed a supplemental brief listing additional assignments of error. The case was then reargued before the full Court.

The pertinent issues now before the Court are:

1. Whether the law officer erred in refusing to grant further time for additional psychiatric study.

2. Whether the use of the Army Technical Manual (Tech Manual) TM 8-240, Psychiatry in Military Law, by the court-martial and the board of review precluded its exercise of independent judgment.

3. Whether the law officer's refusal to instruct as requested on the effect of partial mental deficiency upon the ability of the accused to premeditate was prejudicial, and therefore requires a rehearing.

4. Whether the board of review applied the rule cited by it in its opinion that "To justify a reversal circumstances must be such that the verdict shocks the conscience of the court," and therefore committed reversible error.

The record discloses the following facts: During the early evening hours of November 21, 1953, the lifeless body of eight-year-old Susan Rothschild was found by her father. It was lying face down in a moat at Camp Zama, Japan. A medical examination revealed that death had been caused by strangulation or drowning less than an hour earlier. Six days later, to agents of the Criminal Investigation Division of the Army, the accused confessed that he had met Susan, talked with her about ten minutes, and then, as she turned to leave "I grabbed her and choked her." After choking her, he gagged her with her "panties" and dragged her into a ditch. He then put his foot on her head and held her face under the water. The accused had been drinking since about noon that day. The reason for the homicide was "just that she was there." After the deed was done, he experienced a sexual release.

The accused was charged with premeditated murder and the only issue raised before and during the trial was that of sanity. Upon each occasion counsel for the accused attempted to obtain psychiatric examination of the accused by nonmilitary American doctors. Although his efforts with respect to American doctors were unsuccessful, he did succeed in obtaining the services of two Japanese psychiatrists. They were Dr. Takeo Doi, Department of Neuro-psychiatry, Tokyo University Medical School, and Dr. Susumu Hayashi, Superintendent of the Tokyo Metropolitan Matsuzawa Mental Hospital. Both testified at the trial that they had examined the accused, along with all pertinent records relating to his mental responsibility, and, in their opinion, at the time of the offense he was suffering from schizophrenia, and he could neither distinguish right from wrong nor adhere to the right.

Four Army psychiatrists testified for the prosecution. All had examined the accused and had studied the records regarding his mental capacity. Each testified that the accused was, in his opinion, suffering from a nonpsychotic behavior disorder and accordingly was able at the time of the offense to distinguish right from wrong, to adhere to the right, and at the time of the trial was

able to understand the nature of the proceedings against him and cooperate intelligently in his defense.

The additional evidence on the accused's sanity considered by the board of review and now before us is (1) A psychiatric and psychological report from the Menninger Clinic, which classified the accused as suffering from:

> ". . . [A] definite mental illness characterized by periodic episodes of uncontrolled violence and excitement, interspersed with periods in which he appears either normal or rebellious and anti-social to casual observers. Even in these non-violent periods, there is evidence of the underlying mental illness. In the American Psychiatric Association Standard Nomenclature currently in use, this illness would be classified as, Schizophrenic Reaction, chronic, undifferentiated type, manifested by episodes of transitory dereistic excitement, inappropriate emotional responses, extensive inner fantasy life, perplexity and concern over mental illness, blurring of boundaries between fantasy and reality, impulsive aggressive behavior, with egocentricity and fantasies of omnipotence.
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> "C. On the basis of our examination of the patient, a review of his history, and a study of his previous medical records, it seems clear he has a mental disease which deprived him completely of the power of choice and volition so that he was unable, concerning the particular act charged, to adhere to the right."

The report concluded,

> "Yet, regardless of any disagreement about how sick he is between excited episodes, it seems clear that the offense arose during, and was a manifestation of, an acute psychotic episode. There is a definite history of similar episodes prior to the offense, and the examination reveals, in minature [sic], the kind of pathology that can be easily and sometimes

> unpredictably precipitated into violent episodes. In our opinion, these episodes will recur in the future. Unfortunately, present day psychiatric treatment techniques offer nothing for this man, and we would have to consider him, at this time, permanently and incurably ill. As psychiatrists, we simply have to say that this man is dangerous to society, and will remain so for many years, probably all of his life. He should not be released to society unless there is clear cut evidence of major change for the better in those pathological psychological processes demonstrated to be present."

(2) A statement, based upon the trial record and medical reports, from Dr. Winfred Overholser, Superintendent, St. Elizabeth's Hospital, Washington, D. C., wherein he announces the opinion that it is doubtful whether the accused could distinguish right from wrong at the time of the offense; however, he has no doubt but what the accused was *unable* to adhere to the right and could not have premeditated with regard to the offense charged. But the accused *could* understand the nature of the trial and appellate proceedings against him; *could* cooperate intelligently in his defense; (3) A statement from Dr. Manfred S. Guttmacher, Chief Medical Officer of the Supreme Bench of Baltimore, Maryland, in which he notes that the accused's conscious controls are profoundly affected by alcohol. Dr. Guttmacher did not, however, designate the accused as being a paranoid schizophrenic, but rather as suffering from "profound character neurosis, with periods of psychotic-like behavior, particularly when imbibing alcohol." He "inclined" toward the view that the accused was able to distinguish right from wrong but was *unable* to adhere to the right. He points out that in this area judgments are extremely difficult to make and if present military medical criteria were applied, the accused should "probably be considered responsible"; (4) A report from The Surgeon General of the Army, dated January 9, 1956, in which he reviews the Menninger Report and previous material relating to the sanity of the accused. In the opinion of The Surgeon

General, the accused could distinguish right from wrong, could adhere to the right, and possesses sufficient mental capacity to understand the nature of the proceedings against him.

After reviewing the additional information as to the accused's sanity, the board of review again found the accused mentally responsible for his acts. The conviction was affirmed. There was substantial evidence to support the board's finding, and, therefore, this Court cannot find that as a matter of law the board erred. United States v. Bunting, 6 USCMA 170, 19 CMR 296.

The accused argues that his rights were prejudiced by the refusal of the law officer, to allow him time for additional psychiatric study. Perhaps it would have been more appropriate to have granted the accused additional time for examination by the Japanese psychiatrists, but we cannot say that under the circumstances of this case the accused did not have sufficient time to prepare his defense. From December 1, 1953, to February 6, 1954, a board of medical officers examined the accused, and their report was sent to the defense counsel on February 9, 1954. On the same date the defense counsel requested the commanding officer to send the accused to Topeka, Kansas, to be examined by the Menninger Clinic. February 16, 1954, the defense was informed that its request would not be complied with. However, Government facilities, records on the accused, and Government psychiatrists were available to the accused and counsel. On March 16, 1954, counsel for the accused asked for a month's continuance in order to obtain a deposition from Dr. Menninger. This motion was denied. Counsel then moved for an indefinite continuance for time to bring—if possible—Drs. Menninger, Kozal, or Overholser to Japan. This motion was also denied but a continuance was granted for one week to secure Japanese psychiatrists. The defense moved again on March 22, 1954, for a continuance in order to obtain the presence of Dr. Overholser as a material witness; however, the defense could furnish nothing definite with respect to whether, if ever, Dr. Overholser would be available in Japan. An additional continuance for two days was granted. We

note that the Japanese psychiatrists stated that in their opinion the accused was not responsible for his acts. That being so, and from all the facts we cannot find the rulings of the law officer to be as a matter of law reversible error. In any event, the determination as to whether the request for a continuance should or should not have been granted rested within the sound discretion of the law officer. Under the circumstances of this case we cannot say that he abused that discretion. See United States v. Knudson, 4 USCMA 587, 16 CMR 161.

The accused also argues that he was prejudiced because use of the Department of Army Technical Manual, TM 8-240, Psychiatry in Military Law, by the court-martial and board of review, precluded their exercise of independent judgment. In this connection we announce that at most the "Tech Manual" occupies the position of a text book or treatise on the subject of insanity. (See opinion of Chief Judge Quinn, United States v. Kunak, 5 USCMA 346, 17 CMR 346.) It is not competent evidence of either the facts or opinions advanced by the authorities. It may be used to a limited extent in connection with the testimony of an expert witness, but it does not have any independent probative value. A study of the record in this case now before us makes it abundantly clear that all the psychiatrists who testified at the trial arrived at their respective conclusions from an independent evaluation of many factors taken from numerous sources and the witnesses appeared to be completely unfettered by the "Tech Manual." As a matter of fact, there is no mention of this Manual throughout the trial. All of the psychiatric testimony for the Government was to the effect—without equivocation—that the accused knew what he was doing at all times, could distinguish right from wrong and adhere to the right as to the offense charged. And at no place in the law officer's instruction did he advert to the "Tech Manual" or call the court's attention thereto.

During an out-of-court conference the accused requested the following instruction: "There is other evidence in this case which you may properly weigh with the evidence of voluntary intoxication in determining the accused's reasoning ability, such as the history of impulsive aggressive outbursts described by various witnesses before this court and the mental status of the accused as described by the expert witnesses." The accused assigns as error the refusal of the law officer to give this instruction on partial insanity as affecting premeditation. Although the law officer refused the requested instruction he gave instead, "In the light of all the evidence, if you have a reasonable doubt that the accused was mentally capable of entertaining the premeditated design to kill involved in the offense of premeditated murder you must find him not guilty of that offense." The law officer felt that this instruction adequately covered the effect of partial insanity on premeditation. During the out-of-court conference, he stated, "I am not going to give your proposed instruction . . . I believe my instruction is sufficient to cover all that without enumerating the evidence." In United States v. Smith, 5 USCMA 314, 17 CMR 314, the trial court was given an almost identical instruction. This Court held, "This instruction adequately informed the court of the possibility of partial responsibility—and a consequent finding of unpremeditated murder. Thus, no error inheres in the *finding* of premeditated murder. Cf. United States v. Kunak, supra." Also see United States v. Higgins, 4 USCMA 143, 15 CMR 143. Moreover, the requested instruction in the instant case was somewhat similar to the instruction requested by the defense in United States v. Dunnahoe, 6 USCMA 745, 21 CMR 67. As set out in that case, the pertinent portions of the requested instruction read:

> " 'There is other evidence in this case which you may properly weigh with or against the evidence of voluntary drunkenness in determining the accused's reasoning ability, such as the evidence of the accused's muscular coordination immediately before and immediately after the alleged offense, the accused's ability to speak coherently shortly after the offense, the accused's apparent lack of concern for himself shortly after the alleged offense, the accused's failure to conceal the body of the alleged victim, the

accused's failure to obtain or conceal certain real evidence which tended to connect him with the alleged offense, the accused's statements to fellow soldiers made shortly after the alleged offense, and the accused's ability later to remember certain of the details surrounding the alleged offense.

" 'If, in the light of all the evidence, you have a reasonable doubt that the accused was mentally capable of entertaining the premeditated design to kill involved in the offense of premedidated murder, you must find him not guilty of that offense.' "

This Court stated, after inspection of the quoted portions of the instruction (exclusive of the second paragraph, which was considered sufficient to meet the standards of partial insanity in Smith, supra, and Kunak, supra), that:

". . . The vice of the requested instruction is that it singles out bits of evidence and emphasizes them to the exclusion of others. An accused may not isolate particular facts of the case favorable to him and demand that the law officer give undue prominence to them. Neither may he, by suggesting some facts, require the law officer to summarize every fact for or against every issue. United States v. Harris, 6 USCMA 736, 21 CMR 58."

It was precisely for this reason that the requested instruction was refused in the case now before the Court. When the requested instruction was proffered by the defense, the trial counsel objected as follows:

". . . I should like to suggest in reference to what counsel has offered that if there is to be any reference to specific evidence then all of the specific evidence which might be considered upon the issue should also be referred to and that in any event it should always be said in any instruction that this and all other evidence in the case touching upon these issues are what you should consider in arriving at your findings."

Likewise, here, the law officer—in line with the Court's reasoning, later reflected in Dunnahoe, supra—apparently concluded that the defense counsel was asking him to "single out bits of evidence and emphasize them to the exclusion of others," and feeling that he was going to give an instruction which would be sufficient as to the effect on premeditation of mental deficiency short of insanity, refused the instruction with the remark that, "I believe my instruction is sufficient to cover all that without enumerating the evidence." The better practice would have been for the law officer to have specified the circumstances bearing upon the problem here. But we are of the opinion that his failure so to do did not prejudice the accused. The law officer's instructions, taken as a whole, were adequate. In passing, we note that appellate defense counsel complains of the definition of "irresistible impulse" given by the law officer at the trial. Portions of this instruction were discussed in an out-of-court hearing and certain modifications were made at the defense counsel's request. After the modifications, counsel for the accused voiced no additional objections to this part of the law officer's instruction. As given, the instructions on irresistible impulse follow the Manual.

The accused maintains that his rights have been prejudiced by the board of review by applying an appellate rule that "to justify a reversal circumstances must be such that the verdict shocks the conscience of the court." This, of course, is not the proper test which should be applied by a fact-finding tribunal and if the board in fact applied such a test, it would be error. However the foregoing language was tacked on to another quotation by the board which had to do with conflicting psychiatric testimony. The entire quotation was taken from Holloway v. United States, 148 F2d 665 (CA DC Cir) (1945), cert den 334 US 852 (1948), 92 L ed 1774, 68 S Ct 1507. The quoted portion applies to the Federal courts which have no fact-finding powers. But, the board of review here had fact-finding powers and therefore this language has no application to it. Article 66, Uniform Code of Military Justice, 50 USC § 653. Following the quotation from the Holloway case, supra, the board

concluded its opinion, with the following terminal paragraph:

> "Consequently, pursuant to our power under the Uniform Code of Military Justice, Article 66(c), and in accordance with the order of the United States Court of Military Appeals, the board has considered reports of Doctors Menninger and Overholser concerning the accused's sanity and evaluated them in conjunction with the evidence of record, together with the latest opinion of The Surgeon General of the Army and has independently arrived at the same conclusion as the members of the court-martial, and finds that the accused was at the time of the offense and at the time of trial and is presently beyond a reasonable doubt mentally responsible for his acts."

Clearly the board of review did not apply the quoted language to its finding for it is apparent from the board's own language that it concluded, after studying all the evidence, that the guilt of the accused had been established beyond a reasonable doubt.

We have reviewed the record of trial with care. The accused was represented by two attorneys, then in uniform, now in the civilian practice of law, who were competent trial lawyers, and they guarded the rights of their client with commendable force and vigor. The court-martial under proper instructions on the law decided the issue of fact against the accused. The board of review with its fact-finding powers has also decided the issue against the accused. We find no errors of law which prejudiced the substantial rights of the accused.

The decision of the board of review is affirmed.

Chief Judge QUINN concurs.

LATIMER, Judge (dissenting):

I dissent.

This is a most difficult case to decide objectively because we are faced with a beastly and senseless crime committed against a child of tender years. Nonetheless,

the accused is one whose mental processes have, by any medical yardstick, been impaired. There is practically no dispute in the facts, for the killing is admitted, the accused's medical history is not controverted, and the evidence upon which the experts base their opinions is settled. The real dispute concerns the conclusion to be drawn from the medical evidence, for the expert witnesses are divided sharply on accused's mental condition and the issue of his responsibility for the offense. However, there are certain matters upon which they agree. Some five or more civilian psychiatrists and six or more military psychiatrists have participated in this case and they are unanimous in the conclusion that, regardless of the nature of accused's illness, he is dangerous to society, will remain so for many years, and should not be released from confinement unless there is clear and positive evidence of a major change for the better in his pathological and psychological processes. In addition, they agree that the accused suffers from some illness which may at times affect his mental processes. The military psychiatrists diagnose his condition as a character disorder, while most of the civilian experts arrive at the conclusion that he has psychotic episodes and that the killing probably occurred during one of those periods. Lastly, the experts agree that, regardless of how the illness is catalogued or characterized, it has existed for some time and it is a part of accused's lifelong pattern of behavior.

It would serve no real purpose were I to set out the facts underlying the various conclusions reached by the experts. It is enough to say that those experts from the civilian community who testified or otherwise submitted their opinion are recognized as some of the outstanding psychiatrists in America, and they presented powerful reasons to justify their opinions that accused was insane at the time of the offense and not mentally responsible for the crime. On the other hand, military medical experts gave good reasons to support their unanimous conclusion that the accused, while suffering from a chronic, severe anti-social personality, with aggressive and sadistic trends, was sane at the time of the offense and legally responsible for its commission.

Our task would not be difficult if we were faced only with a dispute in the evidence or the inferences to be drawn therefrom, for if that were the gist of the controversy, we could solve the problem by merely saying that we do not have fact-finding powers, that two fact-finding agencies have resolved the issues against the accused, and that we are powerless to interfere. But we are faced with an instructional infirmity, and, in the light of the evidential posture of this case, I believe that deficiency is sufficient to undermine the findings of premeditated murder.

I agree that the law officer instructed the court-martial members that if, in the light of all evidence, they had a reasonable doubt the accused was mentally capable of entertaining the premeditated design to kill involved in the offense of premeditated murder, they must find him not guilty of that offense. Such language may be found within this cold record, but that is not the full story, for it was preceded by other instructions which must have had a tendency to becloud the issue and confuse the court members. Certainly, if that statement was fully and fairly understood by the court members to mean that accused's mental state, regardless of the diagnostic label, could be considered in determining his mental capacity to premeditate, then I would concur with my associates. However, my perusal of the record forces me to conclude that the members of the court-martial were not told informatively how to consider a condition which, if the Government's witnesses were to be believed, might have prevented the accused from premeditating, but which would not, under their view, relieve the accused of criminal responsibility for the homicide. Very briefly, I will mention my reasons for that conclusion.

The instruction referred to in the Court's opinion is quoted as it appears in the record. It there appears on the page as a separate paragraph, but it was given immediately following an instruction on intoxication. The instruction on that subject deals with its effect on premeditation, but any reference to the effect which a mental condition less than insanity, such as a character or behavior disorder, as those conditions are defined in military publications, might have on that element are singularly missing. More to the point, the instructions on insanity, without some sort of additional explanation, would lead a court member to believe that the accused's mental condition could only be considered if it amounted to legal insanity, and then solely for the purpose of determining whether the accused was to be relieved of criminal responsibility for the principal offense and all included offenses.

In dealing with the issue of insanity, the law officer gave the usually accepted instructions previously found in military cases. He used the right and wrong test in conjunction with the irresistible impulse theory. In dealing with the ability to adhere to the right, he specifically informed the members of the court that before that hypothesis could be used, it was necessary that there be a total impairment of the ability to adhere to the right and that something less than that did not suffice to meet the standards of military law. In addition, he informed the court-martial members that an irresistible impulse must be an insane, irresistible impulse, that is, an irresistible impulse resulting from a disease of the mind as distinguished from moral insanity, for he said that moral insanity, strictly speaking, is not insanity at all. Furthermore, he continued on to say that, for practical purposes, inability to adhere to the right occurs only in psychotics and that a mere defect of character, willpower, or behavior, as manifested by ungovernable passion or otherwise, does not necessarily indicate a lack of mental responsibility, even though it may demonstrate a diminution or impairment of the ability to adhere to the right. This is all very well when discussing the question of whether the accused is to be absolved of all criminal responsibility, but the thrust of those instructions is away from any theory that something less than psychosis can be considered by the court for any purpose. If the court-martial members understood the instruction in the manner in which I have interpreted it, then they would have to conclude that if the accused was psychotic he could be found not guilty, but that any impairment of the mental processes which did not reach that level of severity

could not be considered at all. If such was the case, then the accused was prejudiced for, while the record would support a finding that he was legally sane, the medical evidence is also clearly sufficient to support a finding that his mental condition prevented him from premeditating the commission of this senseless crime. Surely this man was placed by the evidence in a category such that his illness must be considered in its relationship to both criminal responsibility and to the element of premeditation. The first was covered adequately by the instructions, the second not really at all.

In the recent case of United States v. Dunnahoe, 6 USCMA 745, 21 CMR 67, I set out the reasons why I believed that well-recognized conditions which are characterized by some psychiatrists as character disorders and others as mental defects or derangements could be considered by court-martial members for the purpose of determining whether they affected the mental processes of an accused to such an extent that he could not premeditate. In that case I was not prepared to say—nor do I at this time believe—that these disorders should be permitted to exculpate a person for the commission of a crime, but I have reached the conclusion that so long as the record shows a fair probability that the condition of an accused's mind is affected by some illness, even though he is not psychotic, the court-martial members should be instructed that they may consider it in ascertaining whether he actually could or did premeditate.

It may well be that my views on this particular issue will not become part of military law, but if a fair trial is to be assured when the life of an accused is at stake, it is necessary that law officers inform court members in clear and unmistakable language that they may consider any evidence in the record which casts light on the issue of premeditation, and that that evidence should not be excluded from consideration merely because medical experts disagree over its diagnostic label.

I would return the record to The Judge Advocate General of the Army for reference to a board of review,

either to affirm a finding of guilty of unpremeditated murder and an appropriate sentence, or to grant a rehearing.

ACTION BY THE PRESIDENT OF THE UNITED STATES

In the general court-martial case of Master Sergeant Maurice L. Schick, RA 33 688 357, United States Army, Detachment Army Medical Service, United States Army Hospital, 8169th Army Unit, APO 50, pursuant to the authority vested in me as President of the United States by Article II, Section 2, Clause I, of the Constitution, the sentence to be put to death is hereby commuted to dishonorable discharge, forfeiture of all pay and allowances becoming due on and after the date of this action, and confinement at hard labor for the term of his natural life. This commutation of the sentence is expressly made on the condition that the said Maurice L. Schick shall never have any rights, privileges, claims, or benefits arising under the parole and suspension or remission of sentence laws of the United States and the regulations promulgated thereunder governing Federal prisoners confined in any civilian or military penal institution (18 USC 4201 *et seq.*, 10 USC 3662 et seq., 10 USC 871, 874), or any acts amendatory or supplementary thereof. As thus commuted, the sentence will be carried into execution. The prisoner shall be committed to the custody of the Attorney General.

/s/ Dwight Eisenhower

THE WHITE HOUSE

March 25, 1960

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

No. CA-779-71

[Filed April 19, 1971, James F. Davey, Clerk]

MAURICE SCHICK, United States Penitentiary, Lewisburg, Pennsylvania 17837, PLAINTIFF

v.

GEORGE J. REED, Chairman and WILLIAM E. AMOS, CURTIS C. CRAWFORD, WALTER DUNBAR, GERALD E. MURCH, Members, United States Board of Parole, DEFENDANTS

COMPLAINT FOR DECLARATORY RELIEF AND FOR INJUNCTION OR RELIEF IN THE NATURE OF MANDAMUS

Plaintiff Maurice Schick, by his attorney, for his complaint alleges:

1. This is an action for a declaratory judgment that plaintiff is eligible for consideration for parole pursuant to 18 U.S.C. § 4202, and to compel the United States Board of Parole promptly to consider plaintiff for parole.

2. This court has jurisdiction by reason of the provisions of 11 D.C. Code § 521 and 28 U.S.C. §§ 1331, 1361 and 2201-02. There exists between the parties an actual controversy, justiciable in character, and in respect of which plaintiff requires a declaration of his rights by this Court and an order directing defendants to take action in accordance with such declaration. The value of these rights to plaintiff exceeds $10,000.

3. Defendants are the Chairman and members of the United States Board of Parole, with offices located in the HOLC Building, 1st and D Streets, N.W., Washington, D.C. 20001.

4. Plaintiff, a federal prisoner serving a life sentence in the United States Penitentiary, Lewisburg, Pennsylvania, is entitled to be considered for parole under 18 U.S.C. § 4202.

5. Defendants have repeatedly refused to consider plaintiff for parole, despite the provisions of 18 U.S.C. § 4202, on the ground that President Eisenhower, in commuting plaintiff's death sentence to life imprisonment in 1960, purportedly made perpetual ineligibility for parole a condition of the commutation. (See attachment.)

6. Such a condition cannot lawfully bar plaintiff from consideration for parole.

7. Continued denial to plaintiff of the right to be considered for parole subjects plaintiff to substantial and irreparable injury.

WHEREFORE plaintiff demands judgment against defendants, as Chairman and members of the United States Board of Parole, in the form of

(1) a declaration that plaintiff is eligible for consideration for parole pursuant to 18 U.S.C. § 4202;

(2) an order directing defendants promptly to consider plaintiff for parole; and

(3) such other and further relief as the Court may deem just and proper.

Dated: Washington, D.C.

April 19, 1971

/s/ Herbert M. Silverberg
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 779-71

MAURICE SCHICK, United States Penitentiary, Lewisburg, Pennsylvania 17837, PLAINTIFF

v.

GEORGE J. REED, Chairman and WILLIAM E. AMOS, CURTIS C. CRAWFORD, WALTER DUNBAR, GERALD E. MURCH, Members, United States Board of Parole, DEFENDANTS

MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Come now the defendants by their undersigned attorneys and respectfully move this Court to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted, or in the alternative for summary judgment. This motion is made pursuant to Rules 12 (b) (1) and (6) and 56 of the Federal Rules of Civil Procedure and is based upon this notice and motion, the certified records of the Department of the Army filed herein as Defendants' Exhibits A through E and prayed to be read as a part of this motion, and the pleadings of the parties, which disclose that there exists no genuine issue of any material fact and defendants are entitled to judgment as a matter of law.

In support of the foregoing, defendants submit a statement of material facts and a memorandum of points and authorities.

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United States Attorney

JOSEPH M. HANNON
Assistant United States Attorney

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

No. CA-779-71

MAURICE SCHICK, PLAINTIFF

v.

GEORGE J. REED, Chairman, United States Board of Parole, et al., DEFENDANTS

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT, AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff hereby opposes defendants' motion to dismiss or in the alternative for summary judgment, and pursuant to Rule 56, Federal Rules of Civil Procedure, moves for summary judgment in his favor. The basis of the opposition and motion, more fully set out in the attachments and memorandum of points and authorities submitted herewith, is that there is no genuine issue as to any material fact, that the Court has jurisdiction over this action, and that plaintiff is entitled to judgment as a matter of law.

Respectfully submitted,

/s/ Herbert M. Silverberg
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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 779-71

[Filed Nov. 9, 1971, James F. Davey, Clerk]

MAURICE SCHICK, PLAINTIFF

v.

GEORGE J. REED, *et al.*, DEFENDANTS

ORDER

This cause having come before the Court on defendants' motion to dismiss, or in the alternative, for summary judgment, and on plaintiff's motion for summary judgment, and, upon consideration of the complaint, the said motions, and of the memoranda and exhibits filed herein, and of arguments of counsel held in open Court, it is by the Court this 9th day of November, 1971,

ORDERED that defendants' motion to dismiss be, and the same hereby is, granted, for the reason of lack of jurisdiction over the subject matter of this action; and it is further

ORDERED that plaintiff's and defendants' motions for summary judgment be, and the same hereby are, denied; and it is further

ORDERED that the complaint be, and the same hereby is, dismissed.

/s/ George L. Hart, Jr.
GEORGE L. HART, JR.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1994

[Received Dec. 8, 1971, Clerk of the United States Court of Appeals]

MAURICE SCHICK, United States Penitentiary, Lewisburg, Pennsylvania 17837, APPELLANT (Plaintiff Below)

v.

GEORGE J. REED, and WILLIAM E. AMOS, CURTIS C. CRAWFORD, WALTER DUNBAR, GERALD E. MURCH, Members, United States Board of Parole, APPELLEES (Defendants Below)

APPELLANT'S MOTION FOR SUMMARY REVERSAL

This is a Motion for Summary Reversal of Judge Hart's dismissal of appellant's complaint below. We summarize herein the facts and history of the case and show that the Motion for Summary Reversal should be granted forthwith.

Summary of the Case

In late 1953 appellant was accused of the murder of an eight-year-old girl, the daughter of a senior officer of the Army base on which appellant was stationed as an enlisted man. He was convicted of premediated murder on March 27, 1954 by General Court Martial, and was sentenced to death.

Appellant spent six years on death row, during which time there were numerous intercessions for clemency on his behalf as well as extensive psychiatric evaluations. In 1960 these culminated in President Eisenhower's commutation of appellant's death sentence to life imprisonment, with the condition that appellant be forever ineligible for consideration for parole.

Under the applicable statute[1] and regulations[2] the United States Board of Parole would by now have considered appellant for parole; he would have been eligible for such consinderation as early as March, 1969. However, the Board of Parole has refused to consider appellant for parole on the ground that it is barred from doing so by the no-parole condition.

On April 19, 1971 plaintiff filed his Complaint For Declaratory Relief and for Injunction or Relief in the Nature of Mandamus. The defendants were the Chairman and members of the United States Board of Parole. The theory of plaintiff's case was that the Board's refusal to consider him for parole is illegal because it is contrary to the Board's organic statute, and because it is based upon an illegal Presidential action—one in flat conflict not only with the organic Parole statute, but with Congressional correctional policy and several constitutional principles as well.

After some procedural skirmishing, on September 20, 1971 defendants moved to dismiss the complaint, or in the alternative for summary judgment. Defendants' motion to dismiss had several bases:

(1) sovereign immunity;
(2) availability of relief by way of habeas corpus;
(3) the asserted inherent unreviewability of a Presidential action such as the one at issue.

A hearing on defendants' motion to dismiss and on the parties' cross-motions for summary judgment was heard on November 5, 1971 by U. S. District Judge Hart. At the conclusion of the hearing Judge Hart stated that

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[1] "18 U.S.C. § 4202: *Prisoners Eligible*

A federal prisoner, other than a juvenile delinquent or a committed youth offender, wherever confined and serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years."

[2] Rules of the United States Board of Parole effective July 1, 1965, at 8-11. Copy attached at Tab A.

he would grant the government's motion to dismiss for lack of subject matter jurisdiction, and that if the court had had jurisdiction over the subject matter of the action, he would have granted the government's motion for summary judgment and would have denied plaintiff's motion for summary judgment. See Transcript, at 2 (reproduced at Tab B).

Without detailing the basis for his decision (and having stated from the bench only that "the Court lacks jurisdiction for the type of action brought here" (Tr. at 2)), Judge Hart entered an order which simply granted defendants' motion "for the reason of lack of jurisdiction over the subject matter of this action." The same order denied both parties' Motions for Summary Judgment. A copy of the order is attached at Tab C.

Basis of this Motion for Summary Reversal

Appellant is aware that summary reversal is an extraordinary form of relief; he realizes that he has the burden of "demonstrating both that his remedy is proper and that the needs of his claim so clearly warrant relief as to justify expedited action." *United States* v. *Allen*, 133 U.S. App. D.C. 84, 85, 408 F.2d 1287, 1288 (1969). Appellant respectfully submits that both criteria are met in the present case.

Appellant contends that under no fair reading of the applicable law could *dismissal* of this action have been sound. Appellant is satisfied that the pleadings below demonstrate the soundness of this contention beyond doubt, and is content to rest the merits of his case for summary reversal on those pleadings. The bulk of defendants' arguments in support of dismissal for lack of subject matter jurisdiction appear at pages 3-6 of their Memorandum of Points and Authorities In Support of Motion to Dismiss or In the Alternative for Summary Judgment. These pages are reproduced and attached hereto at Tab D. Appellant's response to these arguments appears at pages 2-6 of his Memorandum of Points and Authorities in Support of Plaintiff's Opposition to Defendants' Motion to Dismiss or In the Alternative for Summary Judgment, and Plaintiff's Motion for Summary Judgment. These pages are reproduced at Tab E.

It is possible to conjecture that the judgment below reflects the court's conclusion that a presidential action such as the one complained of is simply not reviewable by a court. Such a conclusion flies in the face of a responsible reading of all of the available authority on this issue, as is shown at pages 7-10 of appellant's Memorandum, which also summarizes the government's contentions on this issue. These pages are reproduced and attached hereto at Tab F.

In view of this authority, appellant submits, it is clear beyond question that, at the very least, the district court should have addressed itself to the issues raised below, rather than dismiss the action. The dismissal warrants summary reversal.

Further, appellant contends that there is no reason why this Court cannot proceed to dispose of this case on the merits and summarily reverse the district court's announcement in open court that defendants would have been entitled to prevail on the merits if matters had gone that far. There is no likelihood whatever that this decision would be reversed by Judge Hart upon remand. A remand for further proceedings would thus require appellant to "shuttle back and forth between courts as his case is disposed of in piecemeal fashion." *Dixon* v. *Jacobs*, 138 U.S. App. D.C. 319, 324, 427 F.2d 589, 594 (1970). Such a requirement is peculiarly inappropriate in a proceeding such as this, which even defendants recognize as seeking relief akin to that sought on habeas corpus (Defendants' Memorandum at 3 (Tab D)). As to the need to minimize delays in such a context, *see, e.g.*, *Cross* v. *Harris*, 135 U.S. App. D.C. 259, 269 n.64, 418 F.2d 1095, 1105 n.64 (1969).

Appellant's basic contention on the merits is that the no-parole condition is literally illegal (contrary to the parole laws), and as such cannot be enforced for reasons summarized at page 10 of his Memorandum (Tab G). Plaintiff based additional arguments on the Congressional policy of rehabilitation through virtually universal eli-

gibility for parole, on the concept of separation of powers, and on equal protection and cruel and unusual punishment grounds. While plaintiff recognizes that a decision on some of these grounds, especially the constitutional ones, might preferably be rendered in a context other than that of summary reversal, plaintiff submits that where, as here, there are no factual issues whatever, and where the court below has made its views on the merits plain beyond doubt, as did Judge Hart in this case, this Court is justified in proceeding to resolve the matter on the merits in the summary reversal context. (In *Williams* v. *Robinson*, 139 U.S. App. D.C. 204, 432 F.2d 671 (1970) this Court resolved constitutional (due process) issues on a motion for summary reversal.)

Appellant closes this motion with a prayer for expedition. Unlike that of virtually every other federal prisoner, appellant's path to parole is permanently barred, no matter the extent of his progress toward rehabilitation. He is confined under a system that punishes misbehavior and encourages rehabilitation, but he is presently denied any fruits of even exemplary behavior or of even universally-conceded total rehabilitation. His life is a daily mockery—a cruel hoax in which the better the person appellant becomes, the more severe, unfitting and unrealistic he must perceive his punishment without parole eligibility to be.

Appellant therefore respectfully urges early consideration of the merits of his case, so that with eligibility for parole—which is all that he asks—he can pursue his rehabilitation in the hope that the pursuit will not be in vain.

WHEREFORE, this Court should vacate the judgment of the court below, render summary judgment for appellant on the merits, and grant such other and further relief as to it may appear just and proper.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1994 (C.A. No. 779-71)

MAURICE SCHICK, APPELLANT

v.

GEORGE J. REED,
Chairman, U.S. Board of Parole, *et al.*, APPELLEES

MOTION FOR SUMMARY AFFIRMANCE

On March 27, 1954, appellant was sentenced to be put to death, having been found guilty of the premeditated murder of eight-year-old Susan Rothschild, in violation of Article 118 of the Uniform Code of Military Justice, 10 U.S.C. § 918. Appellant had been a master sergeant in the United States Army, stationed at Camp Zama in Honshu, Japan. The evidence developed at appellant's court-martial showed that young Susan, the daughter of Colonel and Mrs. Jacquard H. Rothschild, had been intercepted while riding her bicycle home in the late afternoon of November 21, 1953. Her father found her lying face downward, under water, in a moat that paralleled the bicycle path. Her panties had been used to gag her, and the lower part of her body was nude. A subsequent medical examination and autopsy revealed bruised and abrasions around Susan's neck and established the cause of her death as asphyxia due to strangulation or possibly drowning. Six days afterward appellant admitted having grabbed Susan and choked her. He explained that he then dragged her to a ditch and placed his foot on her head, holding her face under water, after which he experienced a sexual release.

After exhaustive appellate review, appellant's death sentence was commuted on March 25, 1960, by President Eisenhower to

> confinement at hard labor for the rest of his natural life. This commutation of the sentence is expressly made on the condition that the said Maurice L. Schick shall never have any rights, privileges, claims, or benefits arising under the parole and suspension or remission of sentence laws of the United States and the regulations promulgated thereunder governing Federal prisoners confined in any civilian or military penal institution (18 USC 4201 *et seq.*, 10 USC 3662 et seq., 10 USC 871, 874), or any acts amendatory or supplementary thereof.

Appellant's sentence having been thus commuted, he was committed to the custody of the Attorney General. He is now confined in the United States Penitentiary at Lewisburg, Pennsylvania. The United States Board of Parole has declined to consider appellant for parole in light of the condition contained in the President's commutation of his sentence.

Appellant initiated proceedings in the United States District Court for the District of Columbia, seeking a declaration of his eligibility of consideration for parole pursuant to 18 U.S.C. § 4202 and an order directing appellees promptly to consider him for parole. The matter came on for hearing before the Honorable George L. Hart, Jr. and in due course resulted in an order, dated November 9, 1971, dismissing the suit "for the reason of lack of jurisdiction over the subject matter of this action." Appellant now seeks summary reversal of the District Court's dismissal and, further, resolution of "the matter on the merits in the summary reversal context" (Appellant's Motion for Summary Reversal, at 7), in order to minimize delay, the District Court having already indicated its unfavorable view of appellant's claim on the merits.

ARGUMENT

Recognizing that summary reversal is an extraordinary form of relief, appellant acknowledges that he has the burden of "demonstrating both that his remedy is proper and that the merits of his claim so clearly warrant relief

as to justify expedited action." [1] (Appellant's Motion for Summary Reversal, at 4-5.) Not only has appellant failed to meet his burden, but, rather, the facts and the law warrant summary affirmance of the decision of the District Court that it lacked jurisdiction to entertain appellant's claim.

Because appellant has brought suit against officers of the United States Government, seeking to alter the performance of their official duties, his action is in reality against the United States [2] and is barred by sovereign immunity unless founded upon a specific, statutory consent to be sued.[3] Such want of consent is a fundamental defect.[4] In the District Court appellant relied upon 28 U.S.C. §§ 1331, 1361, and 2201-02 as conferring jurisdiction over this suit on the District Court; appellees submit that none of these statutes does so.

The immunity of the sovereign is not waived under 28 U.S.C. § 1331, the federal question statute. *Cotter Corp.* v. *Seaborg*, 370 F.2d 686 (10th Cir. 1966); *Anderson* v. *United States*, 229 F.2d 675 (5th Cir. (1956). Neither has such a waiver been wrought by the Declaratory Judgment Act, 28 U.S.C. § 2201. *Anderson* v. *United States*, *supra*. Relief under the Declaratory Judgment Act is available only when jurisdiction is already present; it does not operate to enlarge the jurisdiction of a court. *Goldstein* v. *Johnson*, 87 U.S. App. D.C. 159, 160, 184 F.2d 342, 343 (1950).

Similarly, 28 U.S.C. § 1361 did not create any new right against the United States nor waive its sovereign

[1] *United States* v. *Allen*, 133 U.S. App. D.C. 84, 85, 408 F.2d 1287, 1288 (1969).

[2] *Hawaii* v. *Gordon*, 373 U.S. 57 (1963); *Dugan* v. *Rank*, 372 U.S. (1962); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).

[3] *E.g.*, 28 U.S.C. § 1346 (a)(1); 46 U.S.C. §§ 741 et seq.; 28 U.S.C. § 1347, 2409; 42 US.C. § 405 (c)(5)(g); *see* 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 54, at 301-302 (Wright rev. 1960).

[4] *Minnesota* v. *United States*, 305 U.S. 382 (1939); *Mellos* v. *Brownell*, 102 U.S. App. D.C. 67, 250 F.2d 35 (1957).

immunity. *Smith* v. *United States*, 224 F. Supp. 402 (D. Wyo. 1963), *aff'd*, 333 F.2d 70 (10th Cir. 1964); *Scebach* v. *Cullen*, 224 F. Supp. 15 (N.D. Cal. 1963), *aff'd*, 338 F.2d 663 (9th Cir.), *cert. denied*, 380 U.S. 972 (1963). Rather, it permits actions to be brought in local United States District Courts to compel the performance by an officer of the United States Government of a ministerial duty owed to the plaintiff. *Prairie Ban of Pottawatomie Tribe* v. *Udall*, 335 F.2d 364 (10th Cir.), *cert. denied*, 385 U.S. 631 (1966); *Switzerland Co.* v. *Udall*, 225 F. Supp. 812 (W.D.N.C. 1964), *aff'd*, 337 F.2d 56 (4th Cir.), *cert. denied*, 380 U.S. 914 (1964).

It is, of course, well established that mandamus is an extraordinary remedy "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 260 (1947). In order for mandamus to lie, the duty alleged to be owed to the plaintiff must be ministerial in nature, and a positive command must be so plainly prescribed as to be free from doubt. *United States* v. *Walker*, 409 F.2d 477 (9th Cir.), *cert. denied*, 396 U.S. 965 (1969). As applied to the case at bar, the "ministerial duty," the performance of which appellant has sought to compel, would necessitate a direct breach by the Parole Board, an executive agency, of an unambiguous condition attached to appellant's commutation by the President of the United States.

Relief in the nature of mandamus will not be granted when another adequate remedy is available. *Carter* v. *Seamans*, 411 F.2d 767 (5th Cir. 1969). In *Gregory* v. *United States Board of Parole*,[5] the court dismissed a suit for declaratory judgment, noting that a petition for habeas corpus is the proper, adequate and preferred remedy by which to challenge the legality and constitutionality of the conditions of the Government's exercise of control over one's person. Moreover, mandamus proceedings have been dismissed where jurisdiction in one district is invoked under 28 U.S.C. § 1361, but habeas corpus jurisdiction would exist in another jurisdiction. *Schmidt* v. *Laird*, 328 F. Supp. 1009 (E.D.N.C., 1971);

[5] 308 F. Supp. 258 (W.D. Mo. 1969).

Sumpter v. *Laird*, —— F. Supp. ——, (D. Minn., No. 4-70 Civ. 143, May 22, 1970). Appellant's claims are properly cognizable, if at all, only by means of a petition for a writ of habeas corpus under 28 U.S.C. § 2241 *et seq.*

> Article 76 of the Uniform Code of Military Justice, 10 U.S.C. § 876, provides that military review of court-martial convictions shall be "final and conclusive" and "binding upon all . . . courts . . . of the United States." The legislative history of the provision makes clear that relief by way of habeas corpus was an implied exception to the finality clause (S. Rep. No. 486, 81st Cong., 1st Sess. 32; H.R. Rep. No. 491, 81st Cong., 1st Sess. 35). *United States* v. *Augenblick*, 393 U.S. 348, 349-50 (1969) (emphasis added).

Presidential review being the final step in the military judicial process, the actions of the President with respect to the sentence of a military prisoner are judicial in character. *Runkle* v. *United States*, 122 U.S. 543 (1887). Inasmuch as appellant is now incarcerated in the United States Penitentiary in Lewisburg, Pennsylvania, his sole remedy is to seek habeas corpus in the Middle District of Pennsylvania.

With respect to appellant's claim that the condition attached to the commutation of his death sentence by President Eisenhower is "literally illegal" (Appellant's Motion for Summary Reversal at 7), it must be noted that Article 71(a) of the Uniform Code of Military Justice, 10 U.S.C. § 871(a), provides:

> No court martial sentence extending to death or involving a general or flag officer shall be executed until approved by the President. He shall approve the sentence *or such part, amount, or commuted form of the sentence as he sees fit*, and may suspend the execution of the sentence or any part of the sentence, as approved by him, except the death sentence. [Emphasis added.]

Article 76 of the Uniform Code of Military Justice, 10 U.S.C. § 876, provides:

> The appellate review of records of trial provided by this code, the proceedings, findings, and sentence of courts-martial as approved, reviewed, or affirmed as required by this code . . . shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in Article 73 and to action by the Secretary of a Department as provided in Article 74, and the authority of the President.

Such statutory language compels the conclusion that the action taken by the President was authorized and is now binding upon the Board of Parole. Such action was clearly within the Presidential discretion, a discretion founded upon the President's role as commander-in-chief of the armed forces, and is binding upon "all departments, courts, agencies, and officers of the United States," subject only to such further clemency as a future President [6] may choose to bestow upon appellant. The words "as he sees fit" in article 71(a) were intended by Congress "to give the President absolute discretion in determining the amount of the sentence to be approved by him." [7]

The President's pardoning powers, inherently under the Constitution and expressly by statutory affirmation, have not been diminished by any of the federal parole statutes, including 18 U.S.C. § 4202, the basic federal parole law under which appellant claims eligibility. The very first federal parole law, Public Law 269, 36 Stat. 819, effective June 25, 1910, provided:

> That nothing herein contained shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case. . . .

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[6] *See* 41 Op. Att'y Gen. 251 (1955).

[7] *See* S. Rep. No. 486, 81st Cong., 1st Sess. 30 (1949); H.R. Rep. No. 491, 81st Cong., 1st Sess. 33 (1949).

The "Historical and Revision Notes" to 18 U.S.C.A. § 3570 indicate that such language does not appear in the present codification because it had been deleted as unnecessary in view of the pardoning power of the President under the Constitution. The Note further informs that the pardoning power of the President is not subject to legislative control.[8]

In *Ex parte Wells*,[9] the Supreme Court upheld President Fillmore's pardon of a convicted murderer with the condition that he remain in prison for the term of his natural life. The Court observed that historically a pardon was frequently conditional, since the sovereign could extend his mercy upon such terms as pleased him. In *Ex parte Grossman*[10] the Court suggested that even a grave abuse of the Presidential pardoning power would be properly remedied by impeachment, rather than by a strained construction of that power. Again in 1927 the Court had occasion to review a pardon commuting a death sentence to life imprisonment, expressly holding that such commutation was a proper exercise of the President's power, life imprisonment being a sentence less than death.[11] Clearly, the President's grant of clemency is not a matter for judicial review and must be free from judicial control. *Bishop* v. *United States*, 96 U.S. App. D.C. 117, 223 F.2d 582 (1955), *rev'd on other grounds*, 350 U.S. 961 (1956); *Yelvington* v. *Presidential Pardon and Parole Attorneys*, 94 U.S. App. D.C. 2, 211 F.2d 642 (1954); *Bozel* v. *United States*, 139 F.2d 153 (6th Cir. 1943), *cert. denied*, 321 U.S. 800 (1944).

In light of the foregoing principles and of appellant's considerable burden under *United States* v. *Allen*, *supra*

[8] *See Ex parte Garland*, 71 U.S. 333, 380 (1866), where the Court said that "[t]his power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."

[9] 59 U.S. 307 (1855).

[10] 267 U.S. 87, 121 (1925).

[11] *Biddle* v. *Perovich*, 274 U.S. 480 (1927).

note 1, appellees respectfully submit that appellant has failed to afford this Court adequate predicate for summary reversal.

CONCLUSION

WHEREFORE, appellees respectfully request this Court to grant summary affirmance of the judgment of the District Court.

/s/ Harold H. Titus, Jr.
HAROLD H. TITUS, JR.
United States Attorney

/s/ John A. Terry
JOHN A. TERRY
Assistant United States Attorney

/s/ Michael A. Katz
MICHAEL A. KATZ
Assistant United States Attorney

/s/ James F. McMullin
JAMES F. MCMULLIN
Assistant United States Attorney

[Certificate of Service omitted in printing.]

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

SEPTEMBER TERM, 1971

Civil Action 779-71

No. 71-1994

[Filed Feb. 1, 1972. Nathan J. Paulson, Clerk]

MAURICE SCHICK, APPELLANT

v.

GEORGE J. REED, Chairman of U. S. Board of Parole, et al.

Before: Robinson and MacKinnon, Circuit Judges

ORDER

On consideration of appellant's motion for summary reversal, of appellee's motion for summary affirmance, and it appearing to the Court that the District Court had jurisdiction to consider an action for declaratory judgment against the Board of Parole,[1] it is

ORDERED by the Court that the order of the District Court appealed from herein be, and is hereby, summarily reversed and this case is remanded to the District Court with directions that the action be reinstated.

Per Curiam

[1] See *Young* v. *Director, U. S. Bureaus of Prisons, et al.*, 367 F.2d 331 (D.C. Cir., 1966); *Hurley* v. *Reed*, 288 F.2d 844 (D.C. Cir., 1961).

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 779-71

MAURICE SCHICK, PLAINTIFF

—vs—

GEORGE J. REED, et al., DEFENDANTS

[Filed Mar. 29, 1972. James F. Davey, Clerk]

ORDER

This cause having come before the Court on remand on defendants' motion for summary judgment, and on plaintiff's cross-motion for summary judgment, and, upon consideration of the complaint, the said motions, and of the memoranda and exhibits filed herein, and of arguments of counsel held in open Court, and it appearing to the Court that the conditional commutation of plaintiff's sentence was the result of the exercise by the President of his powers under Article II of the Constitution to grant reprieves and pardons for offenses against the United States, and of his authority as Commander in Chief of the Armed Forces and under the provisions of the Uniform Code of Military Justice; and that there exists herein no genuine issue as to any material fact, and defendants are entitled to judgment as a matter of law, it is by the Court this 29th day of March, 1972

ORDERED that defendants' motion for summary judgment be, and the same hereby is, granted; and it is further

ORDERED that plaintiff's motion for summary judgment be, and the same hereby is, denied; and it is further

ORDERED that the complaint be, and the same hereby is, dismissed.

/s/ George L. Hart, Jr.
GEORGE L. HART, JR.
United States District Judge

UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA CIRCUIT

No. 72-1508

MAURICE SCHICK, APPELLANT

v.

GEORGE J. REED, Chairman of the United States Board of Parole, ET AL.

Argued June 18, 1973

Decided July 23, 1973

Rehearing denied Oct. 1, 1973

Caryl S. Cole, Washington, D. C., with whom Robert N. Sayler, Washington, D. C., was on the brief, for appellant.

James W. Diehm, Asst. U. S. Atty., with whom Harold H. Titus, Jr., U. S. Atty., John A. Terry, and Michael A. Katz, Asst. U. S. Attys., were on the brief, for appellees.

Before WILBUR K. MILLER, Senior Circuit Judge, and WRIGHT and ROBB, Circuit Judges.

ROBB, Circuit Judge:

In 1954 the appellant Schick, a master sergeant in the United States Army, was convicted by a court-martial of the premeditated murder of an 8-year old girl, in violation of Article 118 of the Uniform Code of Military Justice. 10 U.S.C. § 918 (1970).[1] The court-martial sen-

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[1] Article 118 (now, 10 U.S.C. § 918) reads:

> Any person subject to this code who, without justification or excuse, unlawfully kills a human being, when he—
>
> (1) has a premeditated design to kill;
>
> * * * *
>
> shall suffer death or imprisonment for life as a court-martial may direct. May 5, 1950, ch. 169 § 1 (Art. 118), 64 Stat. 140.

tenced Schick to death. In 1960 President Eisenhower commuted the sentence to a dishonorable discharge and imprisonment for life upon the express condition that Schick should "never have any rights, privileges, claims, or benefits arising under the parole and suspension or remission of sentence laws of the United States and the regulations promulgated thereunder governing Federal prisoners confined in any civilian or military penal institution (18 USC § 4201 *et seq.*, 10 U.S.C. 3662 et seq., [sic] 10 USC 871, 874), or any acts amendatory or supplementary thereof." Schick was thereafter committed to the custody of the Attorney General and is now confined in the United States Penitentiary at Lewisburg, Pennsylvania. The United States Board of Parole has declined to consider him for parole although in the absence of the condition attached to the President's commutation he would be eligible for such consideration. *See* 18 U.S.C. § 4202; 10 U.S.C. § 858 (1970).

Schick filed this action in the District Court, seeking a declaration of his eligibility for consideration for parole pursuant to 18 U.S.C. § 4202, and an order directing the members of the Board promptly to consider him for parole. The District Court granted the defendant's motion for summary judgment upon the ground "that the conditional commutation of plaintiff's sentence was the result of the exercise by the President of his powers under Article II of the Constitution to grant reprieves and pardons for offenses against the United States, and of his authority as Commander in Chief of the Armed Forces and under the provisions of the Uniform Code of Military Justice". Schick appeals. We affirm.

In commuting Schick's sentence the President exercised the authority conferred upon him by Article II, section 2, clause 1 of the Constitution, providing that the President "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." That power includes the authority to commute a sentence of death to imprisonment for life. Biddle v. Perovich, 274 U.S. 480, 47 S.Ct. 664, 71 L.Ed. 1161 (1927). Moreover, it is settled that a pardon or a commutation of a sentence may be granted on condition.

Ex parte Grossman, 267 U.S. 87, 120, 45 S.Ct. 332, 69 L.Ed. 527 (1925); Semmes v. United States, 91 U.S. 21, 27, 23 L.Ed. 193 (1875); United States v. Klein, 13 Wall. (80 U.S.) 128, 142, 20 L.Ed. 519 (1871); Ex parte Wells, 18 How. (59 U.S.) 307, 15 L.Ed. 421 (1855); Stroud v. Johnston, 139 F.2d 171, 172 (9th Cir. 1943), cert. denied, 321 U.S. 796, 64 S.Ct. 846, 88 L.Ed. 1085 (1944). The appellant contends, nevertheless, that the condition imposed in this case is illegal and invalid, since it contravenes the statute providing that a prisoner shall be eligible for parole after serving fifteen years of a life sentence. 18 U.S.C. § 4202 (1970).

The courts have stated many times that Congress cannot control or regulate the action of the President in granting pardons or commutations. *See* Ex parte Grossman, *supra*; The Laura, 114 U.S. 411, 5 S.Ct. 881, 29 L.Ed. 147 (1885); Ex parte Garland, 4 Wall. (71 U.S.) 333, 380, 18 L.Ed. 366 (1866); Yelvington v. Presidential Pardon & Parole Attorneys, 94 U.S.App.D.C. 2, 4, 211 F.2d 642, 644 (1954); Thompson v. Duehay, 217 F. 484, 487 (D.C.W.D.Wash.1914), aff'd, 223 F. 305 (9th Cir. 1915). Had Congress attempted to fetter the Presidential power by the parole statute a constitutional question might be presented. We think it clear however that Congress had no intention of interfering with the President's authority, and has not done so. This appears from the history of the parole statute itself, noted by the Attorney General in his opinion, Pardoning Power of the President, 41 Op. Att'y Gen. 251, 255 (1955). The Attorney General said:

> As enacted in 1910, section 10 [of the parole statute] provided that nothing in the act "shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case." 36 Stat. 821, 18 U.S.C. (1946 ed.) 723. This provision does not appear in the 1948 revision of title 18 of the U.S.Code, and the Reviser's Note to section 3570 of that title, dealing with Presidential remission of a sentence, states that the word "pardon" was omitted "as unnecessary in view of

> the pardoning power of the President under Const. Art. 2, § 2, cl. 1. 'This power of the President is not subject to legislative control.' Ex parte Garland, 1866, 4 Wall. 380." [18 L.Ed. 366]

Turning to the Uniform Code of Military Justice, Art. 71(a), 10 U.S.C. § 871(a), in force at the time of Schick's sentence, we find this provision:

> No court-martial sentence extending to death or involving a general or flag officer *shall be executed until approved by the President. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit*, and may suspend the execution of the sentence or any part of the sentence, as *approved by him*, except a death sentence. (Emphasis added). 64 Stat. 131.

The Uniform Code of Military Justice further provided, Art. 76, (now 10 U.S.C. § 876):

> The appellate review of records of trial provided by this code, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this code . . . shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in article 73 and to action by the Secretary of a Department as provided in article 74, *and the authority of the President.* (Emphasis added). 64 Stat. 132-333.

From the unambiguous language of these statutes it is apparent that Congress intended to, and did, preserve fully the commutation powers of the President by permitting him to "approve * * * such * * * commuted form of [a] sentence as he sees fit." It is also apparent that Congress intended that the action of the President, in the exercise of those powers, should be final, conclusive and binding upon all departments, courts, agencies and officers of the United States. In short, the President's

action in this case was not inconsistent with the wishes of Congress as expressed in the parole statute.

Our conclusion on this branch of the case is in accord with the opinion of the Attorney General expressed in *Pardoning Power of the President, supra*, and with the decisions of the Supreme Court of California in Green v. Gordon, 39 Cal.2d 230, 246 P.2d 38, cert. denied, 344 U.S. 886, 73 S.Ct. 187, 97 L.Ed. 686 (1952); and Ex parte Collie, 38 Cal.2d 396, 240 P.2d 275 (1952); cert. denied, Collie v. Heinze, 345 U.S. 1000, 73 S.Ct. 1145, 97 L.Ed. 1406 (1953). A like result was reached by the Circuit Court of Appeals for the Tenth Circuit in Hurt v. Moseley, No. 71-1307, decided in an unreported opinion September 13, 1971.

The appellant argues that confinement without the possibility of parole is cruel and unusual punishment. We think there is nothing to this contention. "By common understanding imprisonment for life is a less penalty than death." Biddle v. Perovich, 274 U.S. 480, 486, 47 S.Ct. 664, 665, 71 L.Ed. 1161 (1927), (Holmes, J.). In light of the atrocious nature of Schick's offense the commuted sentence is not out of proportion to his crime. We note further that the federal narcotics statute which precluded the possibility of parole in certain cases, 26 U.S.C. § 7237, was repeatedly upheld against attack on Eighth Amendment grounds. See for example, United States v. Williams, 143 U.S.App.D.C. 16, 442 F.2d 738 (1970); United States v. Lozaw, 427 F.2d 911 (2d Cir. 1970). This statute applied even in the cases of prisoners sentenced to serve as much as forty years. We also reject the contention that the commuted sentence denies the appellant the equal protection of the laws. Schick is in no worse position than others of his class who were convicted by a court-martial of premeditated murder and sentenced to death during a period when the death penalty was being enforced.

A contention not made in the appellant's brief, but advanced at oral argument, is based upon the decision of the Supreme Court in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The argument runs as follows: Furman v. Georgia means that

the provision for the death penalty in Article 118, UCMJ, 10 U.S.C. § 918 is invalid. Had this been the law at the time Schick was sentenced, he could have been sentenced only to imprisonment for life. 10 U.S.C. § 918. He then would have been committed to a United States Disciplinary Barracks or to a Federal Penitentiary. 10 U.S.C. §§ 858, 3661. In either event he would now be eligible to be considered for parole. 10 U.S.C. § 3663; 18 U.S.C. § 4202.

Had Schick been under a death sentence when Furman v. Georgia was decided that ruling would have required the excision of the constitutionally invalid sentence. Robinson v. Neil, 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed.2d 29 (1973). The flaw in Schick's argument is that when the *Furman* case was decided he was not under a death sentence, and there was therefore nothing to excise. Indeed, as a matter of law, a final and effective sentence of death was never imposd upon Schick. Unlike the judgment and sentence of a court, the sentence imposed by the court-martial was not effective until approved by the President, whose action was by statute made a part of the sentencing process. *See* Article 71(a) UCMJ, 10 U.S.C. § 871(a). The President did not approve the sentence.

Finally, we are mindful that a pardon or commutation "is a part of the Constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed." Biddle v. Perovich, 274 U.S. 480, 486, 47 S.Ct. 664, 665, 71 L.Ed. 1161 (1927). Such an action of the President, explicitly authorized by the Constitution and exercised in a lawful and proper manner, may not be reviewed by a court, and is not to be undone twelve years later upon the basis of *ex post facto* hypothesis and rationalization. *See* Ex parte Grossman, 267 U.S. 87, 121-122, 45 S.Ct. 332, 69 L.Ed. 527 (1924).

The judgment of the District Court is affirmed.

J. SKELLY WRIGHT, Circuit Judge, dissenting:

The United States Board of Parole has refused to consider appellant for parole because the commuted sentence imposed by President Eisenhower includes a "no parole" condition. The sole issue presented is whether this condition is lawful. We are not asked to release appellant, but simply to order the Board to consider his parole application under the same standards as those governing all other federal prisoners.

Appellant brought this action and the District Court considered and decided the case prior to the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The case therefore proceeded under the assumption that the death penalty initially imposed by the court-martial was valid. Although the President has unquestioned power under the Constitution to commute a death sentence, appellant argued that he lacked power to impose a "no parole" condition. As the majority opinion here indicates, the District Court, with good reason, rejected this argument.

But the matter does not end there. While this case was pending on appeal, the Supreme Court issued its decision in *Furman*, holding that "the imposition and carrying out of the death penalty" constitutes cruel and unusual punishment in violation of the Eighth Amendment. The Supreme Court, to paraphrase its own words, "has not hesitated" to apply *Furman* retrospectively, without regard to the criteria normally considered in deciding whether to give retrospective effect to a new constitutional rule. Robinson v. Neil, 409 U.S. 505, 508, 93 S.Ct. 876, 35 L.Ed.2d 29 (1973). *See, e.g.*, Stewart v. Massachusetts, 408 U.S. 845, 92 S.Ct. 2845, 33 L.Ed.2d 744 (1972); Marks v. Louisiana, 408 U.S. 933, 92 S.Ct. 2849, 33 L.Ed.2d 746 (1972). In my view, retrospective application of *Furman* to appellant's case requires us to vacate the death sentence imposed by the court-martial and substitute the only other sentence which lawfully could have been imposed—life imprisonment with the possibility of parole.

I

Although the *Furman* decision itself simply remanded the death penalty cases for further proceedings without spelling out the nature of those proceedings, all courts considering the issue have recognized that retroactive application of *Furman* to any given prisoner requires that the death sentence be vacated and the judgment modified to provide for the appropriate alternative punishment specified by statute for the crime for which the prisoner was sentenced to death. *See* Anderson v. State, Fla., 267 So.2d 8, 9 (1972); In re Baker, Fla., 267 So.2d 331, 332 (1972); Huggins v. Commonwealth, 213 Va. 327, 191 S.E.2d 734 (1972); Sullivan v. State, 229 Ga. 731, 194 S.E.2d 410 (1972). *See also* People v. Anderson, 6 Cal.3d 628, 657 n.45, 100 Cal.Rptr. 152, 171 n.45, 493 P.2d 880, 899-900 n.45 (1972). Where there is but one statutory alternative—for example, life imprisonment—that alternative must be imposed. *See* People v. Anderson, *supra*. Where the alternative sentence is discretionary—for example, rape statutes where the alternative to the death sentence is imprisonment for life or for any term of years within the discretion of the court—the case must be remanded to the sentencing court for resentencing. *See* Anderson v. State, *supra*, 267 So.2d at 10; Huggins v. Commonwealth, *supra*. *Cf.* Sullivan v. State, *supra*. In other words, the court's role after *Furman* is to ensure that the prisoner be treated as if the death sentence was not an available sentence at the time of the original sentencing.[1]

[1] *See also* Sullivan v. State, 229 Ga. 731, ——, 194 S.E.2d 410, 412 (1972) (Jordan, J., concurring specially): "[T]he life sentence now to be imposed * * * shall be subject to all laws and regulations applicable to such sentence as if it had been rendered on the date of the original sentence." It has been assumed that prisoners whose sentences were changed from death to life imprisonment pursuant to *Furman* would become eligible for parole. Thus the legislature of the State of Florida enacted special legislation after *Furman* purporting to require substitution of a life sentence without parole for those sentenced to death prior to *Furman*. *See* Anderson v. State, Fla., 267 So.2d 8, 9 (1972). As the Supreme Court of Florida recognized, this statute raised constitutional problems which the court avoided by resentencing prisoners to life imprisonment prior to the effective date of the new statute. *See* In re Baker, Fla., 267 So.2d 331, 334-335 (1972).

Application of this rule to appellant's case is quite simple. Article 118 of the Uniform Code of Military Justice, 10 U.S.C. § 918 (1970), under which appellant was convicted of premeditated murder, provides that one so convicted "shall suffer death or imprisonment for life as a court-martial may direct." A sentence of death was imposed by the court-martial, and its decision was affirmed by both the Board of Review and the United States Court of Military Appeals. Under *Furman* the death sentence so imposed was unconstitutional and therefore null and void. The only lawful alternative at the time of the original sentencing was a sentence of "imprisonment for life." That sentence must now be substituted for the original death sentence, and appellant must be treated as if he were sentenced to life imprisonment on the date of his original sentence.

Pursuant to statute, all persons sentenced to imprisonment for life by a court-martial eventually become eligible to be considered for parole, there being no statutory authority for a life sentence without parole. If the prisoner is confined in the United States Disciplinary Barracks, his parole opportunities are governed by the parole authority granted the Secretary of the Army, *see* 10 U.S.C. §§ 952, 953 (1970), and the regulations promulgated pursuant thereto, and he becomes eligible to be considered for parole after serving 10 years of his sentence. *See* Headquarters, Department of the Army, Army Regulation 190-26, ch. 1, ¶ 4-1(a)(2) (March 20, 1972). If the prisoner is transferred to a federal penitentiary, his parole opportunities are governed by the same statutes and regulations as are applicable to all other federal prisoners, *see* 10 U.S.C. § 858 (1970), and he becomes eligible to be considered for parole after serving 15 years of his sentence. *See* 18 U.S.C. §§ 4202, 4203 (1970). Since appellant has been imprisoned since 1954, he would now be eligible to be considered for parole under either eventuality.

Applying *Furman* retroactively in this manner, the commutation and condition imposed by President Eisenhower are a nullity, as they were based on an illegal premise. When appellant was sentenced, the options available to the sentencing court were death or life imprisonment with the possibility of parole. Since *Furman* retroactively strikes the death option, the life option with parole possibilities is retroactively imposed as of the date of sentencing. Any subsequent imposition of a sentence of life imprisonment without parole would, of course, increase appellant's sentence and thus would be beyond the President's constitutional authority to grant reprieves and pardons. *See* Biddle v. Perovich, 274 U.S. 480, 486, 47 S.Ct. 664, 71 L.Ed. 1161 (1927); Ex parte Wells, 59 U.S. (18 How.) 307, 15 L.Ed. 421 (1855).

II

The majority seeks to avoid this logic by noting that appellant was not under a death sentence at the time *Furman* was decided. But this misconstrues both the *Furman* decision itself and the doctrine of retroactivity. *Furman* did more than stop executions, though of course that was its most dramatic effect. Not only did the Court say that the "carrying out" of the death penalty is unconstitutional, but it also expressly held, in language we must assume was carefully chosen, that "the *imposition* * * * of the death penalty * * * constitutes cruel and unusual punishment * * *." 408 U.S. at 239-240, 92 S.Ct. at 2727. (Emphasis added.) Because *Furman* is totally retroactive, a death sentence imposed before *Furman* is an illegal sentence. And those who were sentenced to death prior to *Furman* not only cannot have their sentences executed; they must be resentenced with a lawful sentence.

Nor is it significant that appellant is not now subject to a death sentence, since he is clearly suffering adverse consequences from the prior imposition of an illegal death sentence. Where a new constitutional rule is fully retroactive, the courts must do more than amend the direct consequences of prior violations of the rule. In

addition, they must root out as much as possible the adverse, albeit indirect, legal consequences of such prior violations.

A good example of this process may be seen in the Supreme Court's decisions concerning the right to counsel in state felony trials. That right, recognized in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), was held wholly retroactive in Pickelsimer v. Wainwright, 375 U.S. 2, 84 S.Ct. 80, 11 L.Ed.2d 41 (1963) (direct appeal), and Kitchens v. Smith, 401 U.S. 847, 91 S.Ct. 1089, 28 L.Ed.2d 519 (1971) (*habeas corpus*). These cases remedied the direct consequences of prior violations of the right to counsel by overruling felony convictions obtained without counsel. But the retroactivity doctrine extended much further to embrace indirect adverse consequences stemming from prior violations of the right to counsel. In Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), for example, the Court held that an uncounselled felony conviction obtained prior to *Gideon* could not be used to "enhance punishment" for a subsequent offense through operation of a recidivist statute. Under any other rule, the Court noted, "the accused in effect suffers anew" from the pre-*Gideon* deprivation of his right to counsel. 389 U.S. at 115, 88 S.Ct. 258. Similarly, only recently the Court held in Loper v. Beto, 405 U.S. 473, 92 S.Ct. 1014, 31 L.Ed.2d 374 (1972), that an uncounselled conviction obtained prior to *Gideon* could not be used to impeach a defendant's credibility, again noting that the defendant had "suffered anew" from the pre-*Gideon* violation, 405 U.S. at 484, 92 S.Ct. 1014.

The present case thus falls squarely within normal concepts of retroactivity. Although appellant is not now under a death sentence, he has suffered and continues to suffer enhanced punishment—the loss of his statutory right to be considered for parole—as a result of an illegally imposed death sentence.

Further guidance may be found in Jones v. Cunningham, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963), which held that a petitioner could maintain a *habeas corpus* action challenging his conviction even though his

punishment had been alleviated by his being placed on parole. The rationale of that decision was that the petitioner still suffered certain restraints from the underlying conviction, albeit fewer restraints than incarceration. So here, appellant should be permitted to attack his death sentence, even though it has been ameliorated by presidential pardon, because he is still suffering restraints from the underlying illegal sentence.

It is also important to note that appellant's commuted sentence shares many of the evils of the original death sentence. Like the death sentence, imprisonment for life without the possibility of parole is inconsistent with the principle that the "rehabilitation of the convict [is] a basic purpose of criminal justice." Furman v. Georgia, *supra*, 408 U.S. at 306, 92 S.Ct. at 2760 (Mr. Justice Stewart, concurring). *See also id.* at 343, 92 S.Ct. 2726 (Mr. Justice Marshall, concurring); Weems v. United States, 217 U.S. 349, 381, 30 S.Ct. 544, 54 L.Ed. 793 (1910). While I agree that the non-rehabilitative nature of life imprisonment without parole is not sufficient to declare that penalty itself cruel and unusual, the relationship it bears to the death penalty certainly has significance for the retroactive application of *Furman* to this case. For in delimiting its retroactive scope, one must keep in mind the evil sought to be remedied by a new constitutional rule. *Compare* Tehan v. Shott, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966), *with* Burgett v. Texas, *supra*.

As indicated earlier, there is no provision in federal law—civilian or military—for a sentence of life imprisonment without parole. Neither a court-martial nor a judge can impose such a sentence. Congress has ensured that the primary focus of the federal penal system is rehabilitative, looking toward the day when the prisoner can return to society.[2] The death penalty was a glaring ex-

[2] Indeed, the principle of parole was recognized in the military long before parole became available for civilian prisoners. The Act of March 3, 1873, ch. 249, § 6, 17 Stat. 583, a direct predecessor of the current military parole statute, provided: "[The commandant of the military prison] shall take note and make record of the good conduct of the convicts, and shall shorten the daily

ception, and it has now been held illegal. But the same nonrehabilitative exception lives on in muted form in the sentence appellant is now serving.

III

I confess a certain difficulty in comprehending the majority's argument that a sentence of death was never really imposed on appellant because, under the governing statute, the sentence could not be executed until approved by the President. As the majority properly notes elsewhere, the President's power to grant commutations is a constitutional, not a statutory, power. The President can pardon any conviction for an offense against the United States, whether or not authority to do so is granted by statute. Article 71(a), 10 U.S.C. § 871(a) (1970), which provides that no sentence of death can be executed before approved by the President, simply changes the procedure whereby pardons are granted; it does not affect the substance of the President's pardoning power. In a civilian death penalty case, the prisoner bears the burden of bringing his case to the President's attention for purposes of a commutation. In military death penalty cases, however, the Government was assigned the burden of having a death penalty affirmatively approved. The power of the President in both cases is the same, the only difference being the allocation between the prisoner and the Government of the burden of going forward to invoke that power. A sentence of death by a court-martial is every bit as final and effective a sentence of death as one imposed by a civilian court.

Rather than support the majority, Article 71(a) demonstrates that the commuted sentence is integrally related to the original death sentence imposed by the court-

time of hard labor for those who, by their obedience, honesty, industry, or general good conduct, earn such favors; and the Secretary of War is authorized and directed to remit, in part, the sentences of such convicts, and to give them an honorable restoration to duty in case the same is merited * * *." The first parole statute for civilian prisoners was the Act of June 25, 1910, ch. 387, 36 Stat. 819.

martial. As the language of Article 71(a) suggests, the sentence approved by the President is not a new sentence, but is simply a "commuted form of the sentence" imposed by the court-martial. It has no basis in law except as such, and is therefore no more lawful than the illegal sentence itself.

It is argued that we should not apply *Furman* retroactively in the manner suggested because to do so amounts to review by a court of the President's exercise of his constitutional power to grant pardons and reprieves. But to apply *Furman* retroactively to appellant in no way indicates any disapproval by this court of the manner in which President Eisenhower exercised his powers of clemency. It was concededly reasonable for both the court-martial and the President not to have foreseen the *Furman* decision. They quite properly assumed that the death penalty was a lawful sentence. But as Mr. Justice Stewart indicated in Loper v. Beto, supra, 405 U.S. at 484, 92 S.Ct. at 1020:

> "* * * It would surely be unreasonable * * * to expect the judge at Loper's trial to have anticipated *Gideon*, just as it would have been unreasonable to have expected the judge at Gideon's trial to have foreseen our later decision in that case. But a necessary result of applying any decision retroactively is to invalidate rulings made by trial judges that were correct under the law prevailing at the time the judges made them. * * *"

(Footnote omitted.) So here, our substitution of life imprisonment with the possibility of parole for the death sentence as commuted by the President does not disparage in any way the President's exercise of his pardoning power. Rather it simply reflects the fact that a retroactive change in the law has been made.

With all due respect, the majority's refusal to follow the Supreme Court's dictate and treat *Furman* as totally retroactive seems to represent disagreement with the concept of retroactivity itself. It is suggested that decisions made on the basis of rules then assumed valid are "not to be undone twelve years later upon the basis of *ex post facto* hypothesis and rationalization." But the precedents will not tolerate this disparaging view of retroactive application of new constitutional rules. Was it "*ex post facto* hypothesis and rationalization" when the Supreme Court ruled that the petitioner in Kitchens v. Smith, *supra*, who had been convicted without counsel some 19 years before Gideon v. Wainwright, was entitled to release as a result of that decision?

There are all too many for whom the Supreme Court's opinion in *Furman* came too late. For them what is done is done. Even for appellant, retroactive application of *Furman* cannot erase the mental anguish he no doubt experienced during the six years he waited on death row from the time he was initially sentenced to die to the time of the President's commutation. But I can see no reason for not alleviating those effects of the illegal death sentence imposed on appellant which can still be cured. The crime for which appellant was convicted was atrocious, as the majority notes, though the strong evidence of mental illness as a cause of the crime must temper that observation.[3] Under the law, however, even

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[3] The facts of the case were that after a chance encounter and a 10-minute conversation appellant simply grabbed his 8-year-old victim and choked her. There was no evidence of a sexual assault. In his confession to the authorities appellant stated he "just had an uncontrollable urge to kill her" and had done so "just because she was there."

The sole defense raised at the court-martial related to the sanity issue. Four Army psychiatrists who had examined appellant in Japan found him legally responsible, but the two Japanese psychiatrists who were appointed to examine him disagreed. On appeal the Court of Military Appeals directed that appellant be transferred to the Menninger Clinic for further examination. All the psychiatrists who examined him there, including Dr. Menninger himself, concluded that mental illness was a cause of the killing. Evidently appellant had a lifelong history of mental illness manifested by periodic episodes of uncontrolled violence and psychotic behavior, and had been admitted for in-patient psychiatric hospitalization on 13 occasions during World War II. Indeed, during a temporary separation from the Army after 1946, he received disability benefits based in part on his psychiatric difficulties.

Although the reviewing authorities persisted in their affirmance of the court-martial's finding of responsibility, the record clearly shows that the strong evidence of mental illness played a crucial role in obtaining a presidential commutation.

murderers sentenced to life imprisonment are eligible for parole if they can satisfy the Board of Parole that "there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and * * * [that] such release is not incompatible with the welfare of society." 18 U.S.C. § 4203 (1970). In my judgment, *Furman* requires that appellant be given that chance.

I respectfully dissent.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 73-5677

MAURICE SCHICK, PETITIONER

v.

GEORGE J. REED, Chairman of the United States Board of Parole, ET AL.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 22, 1974

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No. 73-5677

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

MAURICE SCHICK, PETITIONER

v.

GEORGE J. REED, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
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Washington, D. C. 20530.

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In 1954, while a master-sergeant in the United States Army, petitioner was convicted by a court-martial of the murder of an eight year old girl, in violation of 10 U.S.C. 918. He was sentenced to death. The conviction and sentence were affirmed throughout the military system of review until the case reached the President of the United States. As required by statute (10 U.S.C. 871(a)), the President reviewed the conviction and sentence, and, in March 1960, commuted the sentence to life imprisonment, upon the express condition that petitioner "shall never have any rights * * * under the parole and suspension or remission of sentence laws of the United States * * *" (Pet. App. 21). Petitioner now contests the continued validity of the no-parole condition of the commutation in light of this Court's decision in Furman v. Georgia, 408 U.S. 238.

Petitioner is presently a prisoner at the United States Penitentiary at Lewisberg, Pennsylvania. He would be eligible to be considered for parole except for the no-parole clause of his sentence. See 18 U.S.C. 4202, 10 U.S.C. 858 (1970). He filed this action in the United States District Court for the District of Columbia seeking a declaratory judgment recognizing his eligibility to be considered for parole and an order directing the Parole Board to so consider him. The district court, before Furman, denied such relief, granting respondents' motion for summary judgment. The court of appeals, after Furman, affirmed, one judge dissenting (Pet. App. 41). We rely on the majority opinion below; we add, however, the following comments.

1. We do not believe that the condition imposed by the President has been rendered unlawful by this Court's decision in Furman. Petitioner contends that the commuted sentence is unlawful because it constitutes an "indirect adverse" consequence (Pet. 11) of the imposition of a death sentence which has been held illegal in Furman v. Georgia, 408 U.S. 238. Furman, however, has been applied retroactively only to vacate unexecuted, but otherwise operative, death sentences--that is, to prevent a person's execution. See Stewart v. Massachusetts, 408 U.S. 845; Marks v.

Louisiana, 408 U.S. 933. As the majority below thus rightly pointed out, "[t]he flaw in Schick's argument is that when the Furman case was decided he was not under a death sentence * * *" (Pet. App. 46-47). A sentence of life imprisonment without parole, which is petitioner's sentence, has not been held unconstitutional. Petitioner and the dissenting judge below also rely on the broad retroactive application which this Court has given to Gideon v. Wainwright, 372 U.S. 335, as support for applying Furman to avoid the indirect adverse consequences of the unperfected death sentence in this case, citing United States v. Tucker, 404 U.S. 443. The basis for retroactivity in the two situations, however, is not similar. The ruling in Gideon went to the integrity of the fact finding process. A conviction contrary to Gideon is deemed unreliable and thus may not be constitutionally used against a defendant for any purpose. In contrast the purpose of Furman was to put an end to the improperly discriminatory use of the death penalty, an objective so different that the Gideon retroactivity precedents simply have no material bearing on the issue here presented.

2. Petitioner further contends that his commuted sentence was unlawful because the no-parole condition was not provided by statute. As held by the court below, however, commutation of a sentence may be granted on any reasonable and lawful conditions. See Ex Parte Wells, 59 U.S. 307, 314; Hagelberger * v. United States, 445 F. 2d 279 (C.A. 5), certiorari denied, 405 U.S. 925; Bishop v. United States, 223 F. 2d 582, 587-588 (C.A.D.C.), vacated on other grounds, 350 U.S. 961; Stroud v. Johnston, 139 F. 2d 171 (C.A. 9), certiorari denied, 321 U.S. 796. The commutation of the death sentence to life-imprisonment without parole eligibility was clearly reasonable and lawful in light of the nature of the

crime involved. Moreover, a commuted sentence may be lawful although the terms of the sentence as commuted are not specifically described by statute for that offense. Stroud v. Johnston, supra; Ex Parte Harlan, 180 Fed. 119, 127 (C.C. N.D. Fla., 1909). 1/

The no-parole condition is clearly one known to the law. When 21 U.S.C. 176(a) was enacted as Section 106 of the Narcotic Control Act of 1956 (Act of July 18, 1956, 70 Stat. 567), Congress provided that persons convicted under that section were not to be eligible for parole. See Rivera v. United States, 318 F. 2d 606 (C.A. 9); Witt v. United States, 287 F. 2d 389, 392 (C.A. 9), certiorari denied, 366 U.S. 950. Moreover, the no-parole condition of the narcotics statute has been found constitutional in the face of claims that it is cruel and unusual punishment and a denial of equal protection of the laws. See, e.g., Sperling v. Willingham, 353 F. 2d 6, (C.A. 7), certiorari denied, 384 U.S. 962; Stewart v. United States, 325 F. 2d 745 (C.A. 8), certiorari denied, 377 U.S. 937.

Finally a refusal to set aside judicially the condition imposed by the President does not mean that the condition must

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1/ Petitioner's reliance on Biddle v. Perovich, 274 U.S. 480, is misplaced. The government in that case contended that a "commutation is the substitution of a milder punishment known to the law for the one inflicted by the court." Id. at 483. This statement does not mean that the punishment substituted must be one provided by the statute for the offense involved. Its plain meaning is that the punishment must be one recognized by the law as a valid form of punishment. Petitioner also relies on the following statement from Biddle, supra: "The only question is whether the substituted punishment was authorized by law * * *." Id. at 283. The phrase following it clearly explains that "authorized by law" means whether the change in the sentence is within the President's pardoning powers, not whether it is established by a particular act of congress.

But see In Re Walker, decided by the Supreme Court of California on February 14, 1974, in which that court, one judge dissenting, held that its decision in People v. Anderson, 6 Cal. 3d 628, holding the death penalty to violate the California Constitution, made a prior commutation to life imprisonment without parole illegal because no such penalty exists by statute under California law. We are lodging a copy of the slip opinion with the Clerk. The relevant discussions are at pages 37-42 and in the two page dissent.

remain unaltered. If there are reasons of compassion or rehabilitation that would justify further commutation of the sentence, the petitioner is free to request it of the President, and the President is free to consider the request and act upon it.

It is therefore respectfully submitted that the petition for a writ of certiorar should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

Supreme Court, U. S.
FILED
JUN 17 1974
MICHAEL RODAK, JR., CLERK

IN THE

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TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. RETROSPECTIVE APPLICATION OF *FURMAN V. GEORGIA* INVALIDATES THE NO-PAROLE PROVISION OF PETITIONER'S COMMUTED SENTENCE SINCE THAT PROVISION COULD NEVER HAVE BEEN IMPOSED BUT FOR THE PRIOR IMPOSITION OF THE DEATH PENALTY 9

A. Retroactive application of *Furman* requires that the death sentence be expunged and that the only alternative sentence provided by law be substituted 10

B. Analagous case law and important policy considerations likewise support invalidation of the no-parole restriction 18

II. COMMUTATION TO LIFE IMPRISONMENT WITH NO POSSIBILITY OF PAROLE EXCEEDS THE PRESIDENT'S ARTICLE II, SECTION 2 POWER TO COMMUTE A SENTENCE 23

A. In exercising his constitutional power to commute a sentence, the President can commute only to a punishment provided by statute 24

Page

B. The action of the President in this case can not now be sustained because it has the net effect of increasing petitioner's sentence above the maximum lawful punishment 33

CONCLUSION 34

TABLE OF AUTHORITIES

Cases:

Anderson v. State, 267 So.2d 8 (Fla. 1972) 12

Bates v. Wilkinson, 267 F.2d 779 (5th Cir. 1959) 11

Bell v. United States, 349 U.S. 81 (1955) 27

Biddle v. Perovich, 274 U.S. 480 (1927) 23, 24, 25, 26, 28, 30, 32, 34

Bishop v. United States, 223 F.2d 582 (D.C. Cir. 1955) 30

Burgett v. Texas, 389 U.S. 109 (1967) 19

Capler v. State, 268 So.2d 338 (Miss. 1972) 12

Chapman v. Scott, 10 F.2d 156 (D. Conn.), *aff'd*, 10 F.2d 690 (2d Cir. 1926), *cert. denied*, 270 U.S. 657 (1926) 23, 28

Commonwealth v. Bradley, 449 Pa. 19, 295 A.2d 842 (1973) 12

DeStefano v. Woods, 392 U.S. 631 (1968) 18

Ex parte Grossman, 267 U.S. 87 (1925) 31

Ex parte Lefors, 165 Tex. Crim. 51, 303 S.W.2d 394 (Tex. Cr. App. 1957) 23

Ex parte United States, 242 U.S. 27 (1916) 27

Ex parte Weathers, 33 F.2d 294 (S.D. Fla. 1929) 30

Ex parte Wells, 59 U.S. (18 How.) 307 (1855) 25, 27, 30, 31

Furman v. Georgia, 408 U.S. 238 (1972) 2, 7-11, 13-18, 20-22, 29, 34

Garcia v. State, 501 P.2d 1128 (Okla. Crim. 1972) 12

Page

Gideon v. Wainwright, 372 U.S. 335 (1963) 18, 19

Gilderbloom v. State, 160 Tex. Crim. 471, 272 S.W.2d 106 (1954) 23

Graham v. State, 253 Ark. 462, 486 S.W.2d 678 (1972) 12

Herman v. Powell, 139 Mont. 533, 367 P.2d 553 (1961) 23

Huggins v. Commonwealth, 213 Va. 327, 191 S.E. 2d 734 (1972) 12

Hurt v. Moseley, No. 71-1307 (10th Cir., Sept. 13, 1971) 30

In re Charles, 115 Kan. 323, 222 P. 606 (1924) 23

In re Walker, 112 Cal. Rptr. 177 (1974) 13, 16

Johnson v. New Jersey, 384 U.S. 719 (1966) 18

Jones v. Looney, 107 F. Supp. 624 (E.D. Mich. 1952) 11

Kavalin v. White, 44 F.2d 49 (10th Cir. 1930) 25, 30

Kitchens v. Smith, 401 U.S. 847 (1971) 19

Linkletter v. Walker, 381 U.S. 618 (1965) 18

Loper v. Beto, 405 U.S. 473 (1972) 19

Lupo v. Zerbst, 92 F.2d 362 (5th Cir. 1937), *cert. denied*, 303 U.S. 646 (1938) 25, 30

Marks v. Louisiana, 408 U.S. 933 (1972) 12

McKnight v. Hunter, 98 F. Supp. 605 (D. Kan. 1951) 11

O'Callahan v. Attorney General, 230 F. Supp. 766, *aff'd*, 338 F.2d 989 (1st Cir. 1965), *cert. denied*, 381 U.S. 926 (1964) 11

People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880 (1972) 12-14

Page

People v. Speck, 52 Ill.2d 284, 287 N.E.2d 699 (1972) 12

Pickelsimer v. Wainwright, 375 U.S. 2 (1963) 19

Robinson v. Neil, 409 U.S. 505 (1973) 11

Schwab v. Berggren, 143 U.S. 442 (1892) 23

Semmes v. United States, 91 U.S. 21 (1875) 30, 31

State v. Baker, 81 Wash.2d 281, 501 P.2d 284 (1972) 15, 16

State v. Johnson, 31 Ohio St.2d 106, 285 N.E.2d 751 (1972) 12

State v. Square, 263 La. 291, 268 So.2d 229 (1972) 12

State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973) 12

Stewart v. Massachusetts, 408 U.S. 845 (1972) 11

Stone v. Burch, 114 Fla. 460, 154 So. 128 (1934) 23

Stovall v. Denno, 388 U.S. 293 (1967) 18

Stroud v. Johnston, 139 F.2d 171 (9th Cir. 1943), *cert. denied*, 321 U.S. 796 (1944) 30

Sullivan v. State, 229 Ga. 751, 194 S.E.2d 410 (1972) 12

Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966) 18

United States v. Calandra, ___ U.S. ___, 94 S.Ct. 613 (1974) 21

United States v. Commissioner of Immigration, 5 F.2d 162 (2d Cir. 1924) 23

United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) 31

United States v. Six Lots of Ground, 27 Fed. Cas. 1097 (1872) 24

Page

United States v. Tucker, 404 U.S. 443 (1972) 19

United States v. Wilson, 32 U.S. (7 Pet.) 150 (1833) 30

Vitale v. Hunter, 206 F.2d 826 (10th Cir. 1953) 30

Walker v. Georgia, 408 U.S. 936 (1972) 12

CONSTITUTION AND STATUTES

Constitution of the United States:

Article II, Section 2 ..... 3, 8, 23, 25

Eighth Amendment 3, 29

10 U.S.C. §§857, 858 ..... 11, 16

10 U.S.C. §§866, 867, 869 16

10 U.S.C. §871 ..... 3, 4, 6, 16

10 U.S.C. §§877, 934 11

10 U.S.C. §918 ..... 3, 5, 10, 20, 34

10 U.S.C. §§952, 953 11

18 U.S.C. §§4202, 4203 ..... 6, 10, 11, 22

18 U.S.C. §4204 3

28 U.S.C. §1254(1) 2

Miscellaneous

Addict Rehabilitation Act of 1966 33

59 Am. Jur.2d §§3, 7, 8 23

3 Attorney General's Survey of Release Procedures (1939) 23, 28

Black's Law Dictionary (4th ed. 1968) 23

4 W. Blackstone, Commentaries on the Laws of England (Cooley ed. 1899) 25

Note, Executive Clemency in Capital Cases, 39 N.Y.U. L. Rev. 136 (1964) 23

Exec. Order No. 11476, 34 Fed. Reg. 10502 (1969) 11

Headquarters, Department of the Army, Army Regulation 190-26 (1972) 11

H.R. Rep. No. 1341, 61st Cong., 2d Sess. 4 (1910) 21

H.R. Rep. No. 2388, 84th Cong., 2d Sess. (1956) 32

	Page
Humbert, The Pardoning Power of the President (1956)	23, 25
Manual for Courts-Martial, 1969 (Revised edition)	11, 15
Moyer, Justice and the Military (1972)	16
Narcotics Control Act of 1956	32
Rules of the United States Board of Parole (1965)	6
36 Stat. 819	21
37 Stat. 650	21
70 Stat. 567	21
80 Stat. 1449	21
Statute of Northampton, 1328, 2 Edw. III, c.2	25
2 U.S. Code Cong. & Ad. News (1956)	32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5677

MAURICE SCHICK,

Petitioner

v.

GEORGE J. REED, *et al.*,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

OPINIONS BELOW

There have been five relevant opinions from various military and civil tribunals, all of which are set forth in the Appendix.

The opinion of the Army board of review was not reported. (A. 4.) The opinion of the Court of Military Appeals remanding the case to the board of review for reconsideration of the accused's sanity is reported at 6 U.S.C.M.A. 493. (A. 9.) The opinion of the board of review on reconsideration is reported at 21 C.M.R. 343.

(A. 12.) The subsequent opinion of the Court of Military Appeals is reported at 7 U.S.C.M.A. 419. (A. 20.)

The United States District Court for the District of Columbia rendered no opinion. The opinion of the United States Court of Appeals for the District of Columbia, which affirmed the District Court's order granting the defendant's Motion for Summary Judgment, is reported at 483 F.2d 1266 (D.C. Cir. 1973). (A. 59.)

JURISDICTION

The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1). Pursuant to that provision, this Court on April 22, 1974, granted appellant's Petition for a Writ of Certiorari.

QUESTIONS PRESENTED

1. Whether the no-parole provision contained in the commutation of Petitioner's death sentence is lawful where the underlying death sentence itself is retroactively illegal under *Furman v. Georgia*, 408 U.S. 238 (1972), and the only other punishment that could have been imposed at trial was life imprisonment with possibility for parole.

2. Whether the President, acting under his constitutional power to "grant reprieves and pardons," may lawfully commute a sentence to punishment that is not authorized by law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Article II Section 2 clause from which the President draws authority to commute sentences and the cruel and unusual punishment clause of the Eighth Amendment. These provisions read, respectively, as follows:

> The President . . . shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. U.S. Const. Art. II, § 2.
>
> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. Const. Amend. VIII.

Article 118 of the Uniform Code of Military Justice provides that:

> Any person subject to [the UCMJ] who, without justification or excuse, unlawfully kills a human being, when he –
>
> (1) has a premeditated design to kill; . . .
>
> is guilty of murder, and . . . shall suffer death or imprisonment for life as a court-martial may direct. 10 U.S.C. § 918.

18 U.S.C. § 4202, *Prisoners Eligible*, provides:

> A Federal prisoner . . . wherever confined and serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years.

Article 71 of the Uniform Code of Military Justice, *Execution of sentence; suspension of sentence*, provides, in part:

(a) No court-martial sentence extending to death or involving a general or flag officer may be executed until approved by the President. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of the sentence or any part of the sentence, as approved by him, except a death sentence. 10 U.S.C. §871(a).

STATEMENT OF THE CASE

The basic facts in this case are straightforward and undisputed. As a result of a military criminal conviction, appellant has been incarcerated for twenty years and, barring action by this Court, cannot be released prior to his death. The reason is that Petitioner is now subject to the following prohibition that the President imposed in commuting Petitioner's death sentence in 1960:

> "Maurice L. Schick . . . [shall be] confin[ed] at hard labor for the term of his natural life. This commutation of the sentence is expressly made on the condition that the said Maurice L. Schick shall never have any rights, privileges, claims or benefits arising under the parole and suspension or remission of sentence laws of the United States and the regulations promulgated thereunder governing federal prisoners confined in any civilian or military penal institution or any acts amendatory or supplementary thereto." (A. 35.)

The underlying facts are as follows. Petitioner Maurice Schick, a Master Sergeant in the United States Army, was tried by general court-martial in 1954 for the murder of a young girl. The only contested issue at trial was the sanity of the accused. Two eminent civilian Japanese psychiatrists examined the accused and found that he was psychotic, either epileptic or schizophrenic, and that he was unable to distinguish

right from wrong. Four Army psychiatrists, however, testified for the prosecution that the accused was suffering from a non-psychotic behavior disorder and that he could adhere to the right and possessed the mental capacity to stand trial. Relying on this latter testimony, the Army court-martial rejected the accused's defense of insanity, convicted him of premeditated murder under Article 118 of the Uniform Code of Military Justice (10 U.S.C. §918), and sentenced him to death.

On review, an Army board of review affirmed the conviction and sentence in an unpublished opinion. (A. 4.) In support of its conclusion, the board cited a Surgeon General's opinion, based on a review of the record, that the accused possessed both mental responsibility at the time of the offense and mental capacity at the time of trial. (A. 7-8.) The case was then forwarded for further review to the civilian Court of Military Appeals which granted a continuance prior to argument to allow further civilian psychiatric examination. The accused was examined by psychiatrists and psychologists at the Menninger Clinic, including Dr. Menninger, who reported to the court that in their opinion the accused was "unable to adhere to the right with regard to the offenses charged at the time he committed the crime." Presented with this new report, the Court of Military Appeals remanded the case to the board of review for reconsideration of the sanity issue. (A. 9.)

Also presented to the board of review as other new evidence were a report by Dr. Winfred Overholser, Superintendent, St. Elizabeth's Hospital, Washington, D.C., and a second opinion by the Surgeon General. Dr. Overholser's opinion was that the accused was unable at the time of the offense to adhere to the right or to formulate the requisite premeditation and " 'that Schick is entitled to a verdict of acquittal by reason of

insanity.'" The Surgeon General stated in his second report that despite the Menninger report he adhered to his original opinion.

Upon reconsideration, the Army board of review again affirmed the findings and sentence. (A. 12.) The Court of Military Appeals, empowered to consider only questions of law, affirmed by a 2-1 decision. (A. 20.) As required by statute, the case was then forwarded to the President for final review. 10 U.S.C. §871(a).

In 1960, six years after Schick had been sentenced to death, President Eisenhower, exercising his authority under Article II, Section 2 of the Constitution, commuted Schick's death sentence to "confinement at hard labor for the term of his natural life," with the express condition that Schick never be eligible for consideration for parole. (A. 35.) Then, as required by statute (10 U.S.C. §871(a)), the President ordered the sentence executed, as modified, and directed that Petitioner be committed to the custody of the Attorney General. Petitioner was accordingly dishonorably discharged from the Army and transferred to the federal penitentiary at Lewsiburg, Pennsylvania.

Petitioner has now been incarcerated for 20 years. Under applicable statutes (18 U.S.C. §§4202-03) and Regulations (Rules of the United States Board of Parole effective July 1, 1965, at 8-11), Petitioner would have become eligible to be considered for parole in March 1969, but for the no-parole provision in President Eisenhower's "commutation" action of March 25, 1960.

In 1971, Petitioner sought a declaratory judgment in United States District Court to require the chairman and members of the United States Parole Board to consider him for parole. (Complaint, A. 36.) At a hearing on November 5, 1971, the United States District Court for the District of Columbia (per Hart, J.) dismissed the case for lack of subject matter jurisdiction. (A. 41.) The Court of Appeals summarily

reversed and remanded the case to the District Court for further action. (A. 56.) On March 24, 1972, the District Court granted the Board of Parole's Motion for Summary Judgment "on both constitutional and military justice grounds. . . ." (A. 57.) The Court of Appeals, by split decision, affirmed the District Court. 483 F.2d 1266 (D.C. Cir. 1973). (A. 59.) A majority of the court held that the retroactivity of *Furman v. Georgia*, 408 U.S. 238 (1972), is irrelevant to Schick on the grounds that when *Furman* was decided Petitioner was "not under a death sentence." 483 F.2d at 1270. The Court also concluded that the President's action was not otherwise unlawful and that the condition imposed did not constitute cruel and unusual punishment. In dissent, Judge Wright expressed the view that the retrospective application of *Furman* requires that the death sentence imposed by court-martial be vacated and replaced by the only other sentence which could lawfully have been imposed, life imprisonment with the possibility of parole. A Petition for Rehearing and Suggestion for Rehearing En Banc filed on August 21, 1973, was denied October 1, 1973.

By order of April 22, 1974, this Court granted Schick's Petition for Writ of Certiorari. Before this Court, as before the courts below, Petitioner does not seek release from confinement. Judgment in his favor would entitle him only to the right to be considered for parole.

SUMMARY OF ARGUMENT

I.

Petitioner, whose death sentence has been commuted to no-parole life, continues to serve a unique and severe

penalty, the existence of which is now possible only because of the prior imposition of the death penalty.

Six years after trial Petitioner's death sentence was commuted by the President to life imprisonment with no possibility of parole. The only two authorized punishments for the offense of which he was convicted were death and life imprisonment *with* possibility of parole, Petitioner could not now be subject to the no-parole provision had the death penalty not first been imposed on him at trial. *Furman v. Georgia*, which invalidated the "imposition" as well as the carrying out of death penalties, has been applied retroactively by this Court. So applied, *Furman* invalidates the indispensable vehicle through which Petitioner became subject to his present no-parole life sentence. For this reason the no-parole restriction can not stand. This result is compelled by the plain wording of *Furman*, other decisions on point, case law on retroactivity, and the interests here involved. To hold otherwise would permit Petitioner, who was singled out for clemency, to continue to serve a unique sentence, more severe than the sentences now being served by those prisoners, not subjects of clemency, who had been sentenced to death but not executed at the time of *Furman*. So irrational a result would perpetuate a severe inequity and pervert the purpose of the clemency power.

II.

The no-parole penalty imposed by the President transgresses two clear limits on the President's commutation powers under Article II, Section 2, of the Constitution. First, in exercising commutation powers, the President can not create new punishments. Controlling precedent, the constitutional doctrine of separation of powers, and strong policy considerations

require that when the President commutes a sentence he can only commute to a lesser punishment prescribed by law. The no-parole life imprisonment sentence imposed upon Petitioner does not satisfy that requirement because it is nowhere prescribed in the Uniform Code of Military Justice and, indeed, is completely foreign to civilian, as well as military, federal law.

Second, the net effect of the President's action in this case has been to increase, rather than reduce, Petitioner's sentence. In light of the retroactive invalidation of the death penalty, the only alternative lawful punishment for the offense of which he was convicted is life imprisonment *with* possibility for parole. The net effect of the President's action has, therefore, been to increase Petitioner's sentence above the lawful maximum, an act beyond the President's constitutional power.

ARGUMENT

I.

RETROSPECTIVE APPLICATION OF *FURMAN V. GEORGIA* INVALIDATES THE NO-PAROLE PROVISION OF PETITIONER'S COMMUTED SENTENCE SINCE THAT PROVISION COULD NEVER HAVE BEEN IMPOSED BUT FOR THE PRIOR IMPOSITION OF THE DEATH PENALTY.

Petitioner's death sentence was commuted to life imprisonment on condition that he never be considered for parole. At issue in this case is the validity of the no-parole provision. *Furman v. Georgia*, 408 U.S. 238 (1972), is applicable because the imposition of the death sentence was the indispensable vehicle through which Petitioner became subject to his present sentence.

Under military law a serviceman could be subjected to a sentence to life imprisonment with no possibility of parole only through the succession of events that occurred in this case – namely, the imposition of the death sentence at trial and subsequent action by the President, under his constitutional power, to commute that sentence. Absent the imposition of a sentence to death, the most severe sentence a serviceman could ever face is life imprisonment *with* possibility of parole. Because the no-parole component of Petitioner's commuted sentence is therefore uniquely dependent on the prior imposition of the death penalty, retrospective application of *Furman* is controlling and invalidates the bar against Petitioner's ever being considered for parole.

A. Retroactive Application of *Furman* Requires that the Death Sentence Be Expunged and that the Only Alternative Sentence Provided by Law Be Substituted.

There is no dispute in this case about the nature of the relationship between the death penalty and the no-parole provision of Petitioner's commuted sentence; it is incontestable that the no-parole condition could not now exist had the court-martial before which Schick was tried not imposed the death penalty. Article 118 of the Uniform Code of Military Justice (UCMJ) authorizes only two sentences for a conviction of premeditated murder: death or life imprisonment. 10 U.S.C. §918. The punishment of life imprisonment under article 118 is, without exception, life imprisonment with possibility of parole. Had Petitioner been sentenced to life imprisonment rather than death, he would now be eligible for parole under the same standards as all other federal prisoners. 18 U.S.C.

§§4202-03 (1970).[1] Indeed, confinement without opportunity for parole is unknown to military law: it is not, and never has been, authorized punishment for any offense under the UCMJ. 10 U.S.C. §§877-934; para. 127, Manual for Courts-Martial, 1969 (Revised edition), Exec. Order No. 11476, 34 Fed. Reg. 10502 (1969) (hereinafter cited as MCM, 1969 (Rev.)). Nor may a no-parole condition be imposed by military reviewing authorities acting to commute a sentence. Para. 88*c*, MCM, 1969 (Rev.). In short, the no-parole condition of the commutation was made possible only through the court-martial's imposition of the death sentence; but for the imposition of that sentence it could not now exist.

Similarly beyond dispute is the retroactivity of *Furman v. Georgia*, 408 U.S. 238 (1972). In *Furman* this Court, per curiam, invalidated the "imposition and carrying out" of discretionary death sentences. 408 U.S. at 239. Subsequent decisions of this Court have accorded *Furman* fully retroactive effect. *Robinson v. Neil*, 409 U.S. 505, 508 (1973); *Stewart v. Massa-*

[1] Military prisoners may be confined in military confinement facitities (usually the United States Disciplinary Barracks in the case of Army prisoners) or, as was Schick, transferred to a federal penitentiary. In either event, Schick would now be eligible for parole. Military prisoners incarcerated in federal penitentiaries are governed by the same statutes and regulations applicable to all federal prisoners, 18 U.S.C. §§4202-3 (1970). *See* 10 U.S.C. § 858 (1970); Jones v. Looney, 107 F. Supp. 624 (E.D. Mich. 1952); McKnight v. Hunter, 98 F. Supp. 605 (D. Kan. 1951); Bates v. Wilkinson, 267 F.2d 779 (5th Cir. 1959); O'Callahan v. Attorney General, 230 F. Supp. 766, *aff'd*, 338 F.2d 989 (1st Cir. 1964), *cert. denied*, 381 U.S. 926 (1964). Likewise, had Schick been confined in the United States Disciplinary Barracks rather than federal prison, he would now be eligible for parole under the appropriate statutes and regulations. 10 U.S.C. §§952-53 (1970); Headquarters, Department of the Army, *Army Regulation* 190-26, Ch. 1, para. 1-4(a)(2) (March 20, 1972).

chusetts, 408 U.S. 845 (1972); *Marks v. Louisiana*, 408 U.S. 933 (1972); *Walker v. Georgia*, 408 U.S. 936 (1972).

Following these decisions, lower courts have held that prisoners sentenced to death must have their sentences vacated and judgments modified to provide for alternative sentences provided by statute. The action of lower courts has ensured that such prisoners be treated as though the death sentence had never been imposed. Cases in which the trial court could have imposed more than one sentence other than death have been remanded for resentencing.[2] Where, as in the instant case, only one alternative punishment was available to the trial court, that punishment has been automatically imposed.[3] In some such cases the appellate court itself imposed the lesser punishment.[4] In others, appellate courts have remanded with directions that the trial court impose the alternative punishment.[5]

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[2] *E.g.*, Huggins v. Commonwealth, 213 Va. 327, 191 S.E.2d 734, 736 (1972); People v. Speck, 52 Ill.2d 284, 287 N.E.2d 699 (1972); Anderson v. State, 267 So.2d 8, 10 (Fla. 1972). *Cf.* Sullivan v. State, 229 Ga. 731, 194 S.E.2d 410 (1972).

[3] State v. Johnson, 31 Ohio St.2d 106, 285 N.E.2d 751 (1972); Capler v. State, 268 So.2d 338 (Miss. 1972); State v. Square, 263 La. 291, 268 So. 2d 229 (1972); Garcia v. State, 501 P.2d 1128 (Okla. Crim. 1972); Commonwealth v. Bradley, 449 Pa. 19, 295 A.2d 842 (1973); State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973); Graham v. State, 253 Ark. 462, 486 S.W.2d 678 (1972); Anderson v. State, *supra*. *See also* People v. Anderson, 6 Cal.3d 628, 657 n. 45, 493 P.2d 880, 899-900 n. 45 (1972).

[4] *E.g.*, State v. Johnson, *supra;* Commonwealth v. Bradley, *supra;* Anderson v. State, *supra*.

[5] *E.g.*, Capler v. State, *supra;* State v. Square, *supra;* Garcia v. State, *supra;* Graham v. State, *supra;* State v. Waddell, *supra*.

In this case there is no pending death sentence. The narrow issue presented is whether *Furman* and the cases according it full retroactivity affect the no-parole aspect of Petitioner's commuted sentence where it is conceded that such condition could never have been imposed on Petitioner had he not been sentenced to death. Stated differently, can a penal restriction that could have come into existence only as a result of a sentence to death survive the retroactive nullification of the death penalty? Case law on point, the plain wording of *Furman*, cases implementing *Furman*, the body of case law on retroactivity of constitutional rulings, and the interests here involved all compel the conclusion that the no-parole condition can not be sustained.

The identical question raised here was recently presented to the Supreme Court of California in *In re Walker*, 112 Cal. Rptr. 177 (1974). The facts of *Walker* are virtually indistinguishable from those in this case. Like Schick, Walker was charged with first degree murder, pleaded not guilty by reason of insanity, was convicted, and was sentenced to death. In 1961 the governor of California commuted Walker's death sentence to life imprisonment without possibility of parole. In 1972 Walker challenged his conviction collaterally, and in 1974, on appeal from Solano County Superior Court, the California Supreme Court considered, *inter alia*, whether Walker's conditionally commuted sentence was affected by *People v. Anderson*, 6 Cal.3d 628, 493 P.2d 880 (1972), the California decision that retroactively held capital punishment to be unconstitutional. Faced with these facts, the California Supreme Court held, in an en banc decision, that the no-parole condition affixed to Walker's commuted sentence was invalid.

The Court in *Walker* first noted that the only punishments provided for first degree murder under the California Penal Code were life imprisonment or death,

which are the same alternatives provided by the Uniform Code of Military Justice under which Schick was sentenced. Rejecting the argument that the combined effect of *Anderson* and the governor's commutation was to *increase* the severity of petitioner's punishment, the court nevertheless held that the no-parole condition attached to the commutation was constitutionally invalid. Since the *Anderson* decision invalidating the death penalty is, as *Furman*, " 'fully retroactive,' " the court stated, any first degree murderer subject to a sentence greater than life imprisonment for that offense is entitled to have his sentence modified. To hold otherwise, that court ruled, would discriminate inequitably against those prisoners sentenced to death who had been subject to clemency in the form of commutation to life imprisonment without possibility of parole.

> It manifestly would be inequitable to hold that, although murderers now under sentences of death may have their sentences reduced to life imprisonment (which is with possibility of parole (see Pen. Code, § 3046)), murderers such as petitioner whose death sentences have been commuted to life imprisonment *without possibility of parole* are not entitled to have that restriction removed from their life sentences. 112 Cal. Rptr. at 194 (emphasis in the original).

Comparing prisoners in Walker's situation with prisoners whose death sentences had not been commuted, the court continued:

> The two groups are identical except that prisoners in the latter group have had their sentences commuted, not unlikely as a result of circumstances in mitigation of the offense. And no considerations have led us to conclude that such inequities should be permitted. *Id.*

In addition, the Supreme Court of California expressly rejected the argument that petitioner is entitled to no relief because he is no longer under a sentence of death (*Id.*, at 193-94), an argument upon which the majority below in *Schick* relied.

Similarly, a Washington state court, on the basis of *Furman*, struck down a sentence to life imprisonment without possibility of parole conditionally imposed by a trial judge. In *State v. Baker*, 81 Wash.2d 281, 501 P.2d 284 (1972), the defendant was found guilty of first-degree murder and the jury requested that the death penalty be imposed. The trial judge, however, deferred imposition of the death penalty on condition that the defendant be imprisoned for life with no possibility of parole, a sentence not authorized by statute. Considering the case on appeal in light of the intervening decision of *Furman v. Georgia*, the Supreme Court of Washington invalidated the deferral and the imposition of no-parole life imprisonment and remanded for resentencing.

By contrast, a divided Court of Appeals below held that Schick's no-parole condition was unaffected by *Furman v. Georgia, supra*. In support of this conclusion, the court stated that the death penalty, which had not been ordered executed, had not been "imposed" on Schick. That position is untenable. Under military law it is clear that a sentence is imposed when it is adjudged at trial. The Manual for Courts-Martial, *supra*, explicitly and repeatedly states that a sentence is "imposed" when it is adjudged by a court-martial at trial. *See, e.g.*, paras. 76*a*(2), (4), (5), 76*b*(1); 81*d*(1); 125, 126*a*, MCM, 1969 (Rev.). Paragraph 126, *supra*, deals specifically with limitations on the trial court's "*imposition* of the death penalty [emphasis added]." That petitioner's death sentence had not been finally executed is irrelevant. The provisions of military law regarding execution of sentences simply parallel civilian

procedures under which execution is stayed pending appellate review.[6]

Moreover, the lower court's contention that the punishment had not been imposed on Schick exalts form over substance and ignores practical reality. Schick spent six years in prison on death row awaiting execution only because a sentence of death had been imposed on him. Had the death sentence not been imposed, Schick would not now be serving under the unique handicap of permanent parole ineligibility. Even the President's commutation order recognized that the sentence had been imposed and that his action only modified it: "As thus commuted, *the sentence* will be carried into execution." (A. 35; emphasis added.) Had no sentence been imposed, there would have been no sentence to commute.

The results reached in *Walker* and *Baker* and the result we seek here are consistent with, and indeed are compelled by, the plain language of this Court's decision in *Furman*. This Court's per curiam decision in *Furman* struck down, on constitutional grounds, the "imposition and carrying out" of discretionary death sentences. 408 U.S. at 239. By so providing, the decision did more than thwart pending executions; it expressly invalidated the *imposition* of the punishment of death. The Court's opinion in *Furman* expressly held

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[6]The differences between the two stem primarily from the fact that appellate review in the military is automatic. Since a military accused does not have to initiate an appeal, execution is stayed by statute until appellate review is completed. Completion of review and therefore time of execution varies, however, for under military law the number of levels of appellate review to which the accused is entitled depends upon the nature and severity of the sentence. 10 U.S.C. §§857, 858, 866, 867, 869, 871 (Art. 57, 58, 66, 67, 69, 71, UCMJ); para. 88, 98-103, 110, MCM, 1969 (Rev.). *See generally* Moyer, Justice and the Military §§2-673, 2-750 to 2-808 (1972).

that the "judgment . . . is reversed insofar as it leaves undisturbed the death sentence *imposed* . . . [emphasis added]." *Id.* at 240. Accordingly, this Court and lower federal courts have, through the retroactive application of *Furman*, consistently invalidated death sentences imposed by trial courts. Rather than simply enjoin executions, these decisions have nullified the act of sentencing. *See, e.g.*, cases cited at notes 2-5, *supra*. Schick's case is different not because of the relief requested, but only because Schick, unlike most other prisoners invoking *Furman*, is concerned primarily with that portion of the Court's holding that prohibits the "imposition," rather than the "carrying out," of discretionary sentences.

There is no doubt that the process by which the death penalty was imposed on Schick was characterized by the same constitutional defects the Court condemned in *Furman*. Like all other prisoners affected by *Furman*, Schick was among "a capriciously selected random handful upon whom the sentence of death [was] in fact . . . imposed." Concurring opinion of Mr. Justice Stewart, *id.* at 309-10. And commutation has not cured the constitutional defects of this process, for Petitioner continues to suffer adverse consequences not now affecting others who were similarly sentenced and whose death sentences have been lifted. Unlike those prisoners, Schick can not under any circumstances be considered for parole. The net effect is that because of the sentencing process to which Petitioner was subjected – now declared by this Court to have violated the constitutional prohibition against cruel and unusual punishments – Schick is now in a special category, serving a unique sentence. There is no rational basis for retroactively invalidating the imposition of the death penalty and at the same time allowing to stand a subsequent penalty which could have been imposed

only bacause of the prior imposition of the death sentence.

The plain meaning of *Furman* is, we submit, dispositive of the issue in this case.

B. Analagous Case Law and Important Policy Considerations Likewise Support Invalidation of the No-Parole Restriction.

Even in the absence of squarely applicable case law, however, the result we seek would be compelled by analagous cases and important policy considerations. Invalidation of the no-parole provision is required by the general principles established by this Court on retroactivity of constitutional rulings. Although there has been considerable development in the last decade with respect to the standards by which courts determine whether a constitutional ruling is applied retroactively,[7] the law is well-established and unchanged as to the consequences of retrospective application. Where a new constitutional rule is fully retroactive, courts eradicate all adverse legal consequences of prior violations of that rule.

Implementation of *Gideon v. Wainwright*, 372 U.S. 335 (1963), holding that an indigent defendant in a state felony trial is constitutionally entitled to appointed counsel, provides several examples. Holding *Gideon* retroactive, this Court eliminated the consequences of prior violations of *Gideon* standards by invalidating convictions of prisoners serving sentences imposed at state felony trials where they had not been

[7] *E.g.*, Linkletter v. Walker, 381 U.S. 618 (1965); Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966); Johnson v. New Jersey, 384 U.S. 719 (1966); Stovall v. Denno, 388 U.S. 293 (1967); DeStefano v. Woods, 392 U.S. 631 (1968).

represented by counsel. *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963) (direct review); *Kitchens v. Smith*, 401 U.S. 847 (1971) (habeas corpus). In addition, this Court granted relief from other adverse consequences suffered by persons who had already served their sentences. In *Burgett v. Texas*, 389 U.S. 109 (1967), this Court reversed a conviction where the indictment reciting prior convictions invalid under *Gideon* was read to the jury. *Loper v. Beto*, 405 U.S. 473 (1972), reversed a conviction where defendant was questioned at trial about four convictions invalid under *Gideon*. And in *United States v. Tucker*, 404 U.S. 443 (1972), the Court ordered that the accused be resentenced where the sentencing judge gave consideration to three prior felony convictions, two of which were constitutionally invalid under *Gideon*.

These cases make clear that in applying *Gideon* retrospectively the Court has consistently sought to erase all adverse consequences traceable to violation of the principle of that decision. In *Burgett v. Texas*, *supra*, the Court wrote that a conviction violative of *Gideon* could not be used "to support guilt or enhance punishment for another offense." 389 U.S. at 115. To do so would force the accused to "suffer anew from the deprivation of that . . . right." *Id. See also Loper v. Beto*, *supra*, at 485. In this case, the unconstitutional imposition of the death sentence, without which there could not be a no-parole provision, enhances Petitioner's punishment by eliminating the possibility that he might be paroled. Similarly, in *United States v. Tucker*, *supra*, Mr. Justice Stewart wrote that the

> real question here is . . . whether the sentence in the . . . [later] case might have been different if the sentencing judge had known that at least two of the respondent's previous convictions had been unconstitutionally obtained. 404 U.S. at 448.

Applying the teaching of that case to Schick, it is apparent that his present sentence differs from what it would have been if the unconstitutional death sentence had not been imposed, for the only permissible alternative punishment was life imprisonment with possibility of parole. 10 U.S.C. §918 (1970).

Indeed, by holding that the no-parole provision is unaffected by *Furman v. Georgia*, the Court would create a special exception to the doctrine of retroactivity. Unaffected by the emergence of new criteria for determining whether a ruling is to be retroactive (note 7, *supra*), the law is settled and unchanged that where a constitutional ruling held to be retroactive, its retrospective application nullifies prior violations of the newly announced rule. Implicit in the Solicitor General's Opposition to the Petition for Certiorari, however, is the novel suggestion that under *Furman* previously imposed death sentences shall be retroactively void for some purposes (namely, the carrying out of such sentences) but not for others (namely, providing the basis, through "commutation," for imposing otherwise unlawful sentences). Such an application, squarely rejected by the California Supreme Court sitting en banc, conflicts with the established body of law on retroactive constitutional rulings.

The rule of these retroactivity decisions also conforms with the principle embodied in the fruit of the poisonous tree doctrine. Although that doctrine applies to admissibility of evidence, not at issue in this case, it embodies the general principle that the government may not take advantage of its own unlawful acts. Where a governmental act is declared unlawful, adverse consequences derived from that act are in like manner legally impermissible. The rule is solidly established that the prohibition against the use of illegally seized evidence extends as well to the fruits of unlawfully seized evidence, *i.e.*, other evidence obtained indirectly through use of the evidence obtained illegally.

As recently as a few months ago, this Court reiterated that a "defendant is entitled to suppress not only the fruits of an unlawful search and seizure but also any derivative use of that evidence." *United States v. Calandra*, ___ U.S. ___, 94 S. Ct. 613, 623 (1974). The manner in which the government seeks to sustain Schick's no-parole provision, derived from the unlawful imposition of the death penalty, is not, despite the obvious distinction, unlike attempts to resist exclusion of "fruits" derived from unlawfully obtained evidence.

Moreover, there is no valid state interest to be served by preserving the condition that Petitioner never be allowed to be considered for parole. Such a rarely imposed condition can serve no deterrent purpose; it results, as Mr. Justice White said of discretionary imposition of the death penalty, in "only marginal contributions to any discernible social or public purposes." *Furman v. Georgia, supra*, at 312. That no accepted social interest is served by a penalty of life imprisonment without chance for parole is further confirmed by the conspicuous absence of that punishment from the federal statutory scheme. Likewise, the maintenance of a sentence to life imprisonment with no possibility of parole advances no penological interest of the State; indeed, it is inimical to the policy favoring rehabilitation that has long been the central feature of the federal system of penology.[8] The legitimate societal

[8] Parole has been available to federal prisoners continuously since the first federal parole law became effective on June 25, 1910. 36 Stat. 819. Prisoners sentenced to life imprisonment have been eligible for parole since January 23, 1913. 37 Stat. 650. Reporting out the first federal law, the House Judiciary Committee stated that "such laws have come to be regarded as humane, in the interests of sound policy, and highly beneficial to the welfare of society." H.R. Rep. No. 1341, 61st Cong., 2d Sess. 4 (1910). With only very limited exceptions (certain narcotics offenses) enacted in 1956 (70 Stat. 567 (July 18, 1956), §103), and curtailed in 1966 (80 Stat. 1449 (Nov. 8,

interest of isolating unrehabilitated prisoners from society at large can in this case be served – as it is served in the case of every other federal prisoner sentenced to life imprisonment – by the rules and decisions of the United States Parole Board.

Finally, if the no-parole condition attached to Petitioner's sentence of life imprisonment were allowed to stand, the effect would be to penalize him uniquely. Petitioner is now in a worse position than all other federal prisoners upon whom the death penalty had been imposed but not executed at the time *Furman* was decided. The reason for this anomaly is that, unlike those prisoners whose death sentences have now been nullified, Schick had been singled out for clemency. Prisoners who were not so treated now come within the reach of applicable parole statutes. Had they, like Schick, been subjects of clemency in the form of commutation to no-parole life imprisonment, they would be in a worse position than they now are. The irrationality of such a result is, of course, obvious. Permitting such a situation to stand would perpetuate a severe and fortuitous inequity and would pervert the purpose of the clemency power.

1966)), Congress has maintained a universal parole policy. The fundamental commitment of this law to the concept of rehabilitation is reflected in the present parole statute which provides that the maximum period of ineligibility for parole shall be 15 years, even in the case of life imprisonment. 18 U.S.C. §4202.

II.

COMMUTATION TO LIFE IMPRISONMENT WITH NO POSSIBILITY OF PAROLE EXCEEDS THE PRESIDENT'S ARTICLE II, SECTION 2 POWER TO COMMUTE A SENTENCE.

The President's power to commute sentences is based on Article II, Section 2 of the Constitution, which authorizes the President to grant "reprieves and pardons" for offenses against the United States except for cases of impeachment. *Biddle v. Perovich*, 274 U.S. 480 (1927). Commutation is the substitution of a lesser, different type of punishment for the punishment actually imposed upon the defendant at trial.[9] *Schwab*

[9]Despite their common constitutional source, pardon and commutation are clearly distinct forms of clemency. Whereas commutation is the substitution of a milder punishment, pardon is an act of grace that relieves the recipient of all legal consequences of a conviction, punishment included. The distinction between commutations and pardons has been recognized in both federal and state law at least since the turn of the century and is now firmly established in American jurisprudence. Illustrative of the numerous cases on point is Chapman v. Scott, 10 F.2d 156, 159 (D. Conn.), *aff'd*, 10 F.2d 690 (2d Cir. 1926), *cert. denied*, 270 U.S. 657 (1926), in which the court stated:

> [T]he fact is that a distinction does exist between a pardon and a commutation, and the legal principles applicable are no longer open to question.

See also United States v. Commissioner of Immigration, 5 F.2d 162 (2d Cir. 1924); Herman v. Powell, 139 Mont. 533, 367 P.2d 553 (1961); *Ex parte Lefors*, 165 Tex. Crim. 51, 303 S.W.2d 394 (Tex. Crim. App. 1957); Gilderbloom v. State, 160 Tex. Crim. 471, 272 S.W.2d 106 (1954); Stone v. Burch, 114 Fla. 460, 154 So. 128 (1934); *In re Charles*, 115 Kan. 323, 222 P. 606 (1924); 3 *Attorney General's Survey of Release Procedures* (1939) 209; Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. Rev. 136, 138 (1964); Humbert, *The Pardoning Power of the President* 27 (1941); *Black's Law Dictionary* 351, 1268-69 (4th Ed. 1968); 59 Am. Jur. 2d §§3, 7, 8. Indeed the constitutions of more than one half of the States expressly confer on their chief executives the power of commutation as distinguished from pardon.

v. Berggren, 143 U.S. 442, 451 (1892); *Biddle v. Perovich*, *supra*, at 487. At issue here are the limitations of that presidential power.

The action in this case transgressed two clear limits on the President's commutation powers. These limits are that: (a) in commuting, the President does not have constitutional power to create new penalties unknown to the criminal code; and (b) commutation is an act of clemency which can not have the effect of increasing the penalty above the lawful maximum.

A. In Exercising His Constitutional Power To Commute a Sentence, the President Can Commute Only to a Punishment Provided by Statute.

This case involves the limitations of the President's constitutional power to commute sentences. There is no question here with respect to the existence of the power to commute. Nor does this case challenge the absolute discretion of the President to decide in which cases he wishes to exercise the commutation power. The only issue presented is what the limits of that power are in terms of the lesser punishments the President may substitute.

That some limits to the President's constitutional power to commute do exist is a matter of general agreement and appears not to be an issue in this case. At no place in his Memorandum in Opposition to the Petition for Certiorari does the Solicitor General challange the proposition that the power is not without limits. This view is consistent with judicial precedent. Courts have frequently stated that the Chief Executive may not attach any condition to a pardon that is "illegal, immoral, or impossible of performance." *E.g.*, *United States v. Six Lots of Ground*, 27 Fed. Cas.

1097, 1098 (1872); *Kavalin v. White*, 44 F.2d 49 (10th Cir. 1930); *Lupo v. Zerbst*, 92 F.2d 362 (5th Cir. 1937), *cert. denied*, 303 U.S. 646 (1938); *Pardoning Power of the President*, 41 Op. Atty Gen. 251, 252 (1955).[10] Consistent with the existence of limits, the Solicitor General defends commutation to life imprisonment with no chance for parole in this case as "reasonable and lawful. . . ." Memorandum for the Respondents in Opposition, at 3.

Neither the precedent cited nor the Solicitor General, however, undertakes to define what types of commutations are unlawful or otherwise to define the limits of the President's constitutional power to commute. Presumably the Government would agree that it would be illegal and beyond a President's constitutional power to "commute" a sentence to flogging, or to a $10,000 fine to be paid to the President's political party, or to the requirement that the prisoner enter the ministry. At issue here is, short of extreme hypotheticals, what are the limits on the kinds of penalties the President may impose.

Given the legality of the President's power to commute under *Biddle v. Perovich*, *supra*, the limits of this power must be – as this Court has previously implied but never held – that a President may commute only to punishments provided by statute. If a President chooses to commute to a lesser sentence rather than to exculpate completely by pardon, he may not impose a punishment foreign to the system of criminal law under which the prisoner was tried. This conclusion is supported by the accepted meaning of the

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[10] Similarly, the King's power to pardon, on which the President's Article II section 2 clemency power is based, was historically subject to limits. *See, e.g.*, Statute of Northampton, 1328, 2 Edw. III, c.2; 4 W. Blackstone, *Commentaries on the Laws of England* 398-401 (Cooley ed. 1899). Limits to the King's power were discussed by this Court in *Ex parte Wells*, 59 U.S. (18 How.) 307, 312-13 (1855).

term commutation itself, by the language of this Court's prior decisions, and by important policy considerations that are inextricably related to the delineation of constitutional limitations.

First, the most direct and logical support for the proposition that the President may not go beyond the statutory framework in commuting a sentence stems from the meaning of the words themselves. The word "commute" means the substitution of a different, lesser form of lawful punishment. Not only is this clear from judicial discussions of the term (*see* p. 25, *supra*), this very definition was confirmed and advanced by the Solicitor General before this Court in *Biddle v. Perovich*, 274 U.S. 480 (1927). In his argument in *Biddle* the Solicitor General explicitly stated that "[a] commutation is the substitution of a milder punishment *known to the law* for the one inflicted by the court." *Id.* at 483 (emphasis added). Thus, commutation extends, by definition, only to the substitution of a punishment provided by law. If a President devises and substitutes some punishment not established by law, he is doing something other than "commuting" the sentence.

Second, this Court's decisions indicate that commutation must be a form of punishment provided by law. In *Biddle v. Perovich, supra*, this Court upheld the right of the President to commute a death sentence to life imprisonment and ruled that consent of the prisoner to such commutation was not necessary. Considering the legality of the commutation at issue, Mr. Justice Holmes, speaking for a unanimous Court, stated: "The only question is whether the substituted punishment was *authorized by law*. . . ." 274 U.S. at 487 (emphasis added). As noted in the preceding paragraph, the Government's view on this issue was the same. *Id.* at 483.

In requiring that the substituted sentence be one provided by law, the Court simply reiterated a

limitation it had implied over seventy years before. In *Ex parte Wells*, 59 U.S. (18 How.) 307 (1855), this Court passed on the validity of a commutation from death to life imprisonment. Upholding the President's action, the Court acknowledged that the law imposed limitations on the exercise of the President's pardon power, stating that the power must be exercised "*according to law*; that is, as it had been used in England, and these States when they were colonies. . . ." 59 U.S. at 310 (emphasis added). Addressing the specific question of what these limitations were in the case of commutations (pardons with penal conditions), the Court made clear that the Chief Executive could not go beyond those punishments provided by law when commuting to a lesser punishment:

> So, conditional pardons by the king do not permit transportation or exile as a commutable punishment, *unless the same has been provided for by legislation.* 59 U.S. at 313 (emphasis added).

The absence of legislative authority for life imprisonment without possibility of parole, the sentence imposed upon Petitioner here, is the paramount feature of this case.

Third, strong policy considerations support this limitation on the President's constitutional power to commute. The definition of criminal offenses and the prescription of sentences is peculiarly a legislative function. In the words of this Court: "The punishment appropriate for the diverse federal offenses is a matter for the discretion of Congress, subject only to constitutional limitations, more particularly the Eighth Amendment." *Bell v. United States*, 349 U.S. 81, 82 (1955). *See also Ex parte United States*, 242 U.S. 27, 42 (1916). The Constitution confers no such power on the President, and absent an express congressional delegation, he is constitutionally precluded from

prescribing criminal punishments. Where, under the guise of commuting a sentence, the President devises a punishment that the legislature has not seen fit to authorize, he intrudes upon the domain of the legislature. Such an act directly violates the concept of separation of powers. The power to exercise clemency – that is, to bestow mercy – does not and should not extend to the invention of new punishments. Where a President elects to confer clemency in the form of commutation, relevant policy concerns dictate that the lesser punishment imposed be one of the array of penalties prescribed by the legislature.

The evils inherent in sanctioning any broader rule are obvious. If a President's power to commute is without limits, he is free to fashion any novel punishment he chooses. Such a punishment, even if less onerous than that imposed by the trial court, could be petty, venal, self-serving, political, or silly. The danger of such license is magnified by this Court's holdings that a commutation need not be accepted by the recipient in order to be implemented. *Biddle v. Perovich, supra,* at 486-88; *Chapman v. Scott, supra,* at 159-60; 3 *The Attorney General's Survey of Release Procedures* 216 (1939). That the likelihood of abuse of power is remote does not negate the existence or the appropriateness of such limits.

Moreover, the exercise of unlimited executive discretion in the exercise of the commutation power may be directly repugnant to important, established national policy. Such is the case here. Commutation to life imprisonment with no possibility of parole is directly contrary to basic United States penal policy. It is inconsistent with the basic purpose of the correctional system to rehabilitate those convicted of crime. *See* authority cited in note 9, *supra.* Life imprisonment without possibility of parole shares with the death penalty the characteristic of "rejection of rehabilitation of the convict as a basic purpose of criminal justice."

Furman v. Georgia, supra, at 306 (Stewart, J., concurring).[11]

Authorities relied on by the Court of Appeals below, by the 1955 Attorney General's Opinion, and by the Solicitor General in his Opposition to the Petition of Certiorari provide no support for the contention that a

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[11] Although we have not here advanced the argument that life imprisonment without possibility of parole is unconstitutional *per se,* the argument is particularly strong that *as imposed in this case,* it constitutes cruel and unusual punishment. The imposition of life imprisonment with no possibility of parole shares all of the constitutional infirmities this Court found to be decisive in *Furman.* First, this sentence incorporates the defects of *Furman,* for it was derived directly from, and could not exist but for, the imposition of the death sentence, which this Court has held invalid under the Eighth Amendment. Moreover, the sentence of no-parole life is itself infected in the same way as the death penalty. This sentence has in fact been inflicted on only a "capriciously selected random handful. . . ." 408 U.S. 309-10 (Stewart, J., concurring). Even more than the death penalty, this punishment fails to serve the major goal of deterrence since it "is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others." 408 U.S. at 312 (White, J., concurring). Like death, this punishment is unusually severe, is inflicted arbitrarily, is substantially rejected by contemporary society, and serves no penal purpose more effectively than some lesser punishment. 408 U.S. at 282 (Brennan, J., concurring). Indeed, it is clear that reasons cited in the dissent in *Furman* for upholding the death penalty do not exist in the case of the non-statutory penalty at issue here. Of substantial significance to the four dissenting justices was the fact that the death penalty was expressly provided by the legislature. "Judicial findings of impermissible cruelty have been limited, for the most part, to offensive punishments *devised without specific authority* by prison officials, not by legislatures." 408 U.S. at 384 (Burger, C.J., dissenting; emphasis added). Noting that legislative authorization is not conclusive, the Chief Justice stated that "the *primacy of the legislative role* narrowly confines the scope of judicial inquiry." *Id.* (emphasis added). The complete absence of legislative authority is, of course, at the heart of the issue here.

President may commute to a sentence not provided by law. Cases cited either involve confusion in terminology, do not actually support the proposition named, or are themselves based on inapposite authority.[12]

First, several lower court decisions cited involved not commutations, but pardons with non-penal condition. *Kavalin v. White*, 44 F.2d 49, 50 (10th Cir. 1930); *Ex parte Weathers*, 33 F.2d 294 (S.D. Fla. 1929); *Lupo v. Zerbst*, *supra*; *Vitale v. Hunter*, 206 F.2d 826 (10th Cir. 1953). Two cases cited in support of the legality of conditional commutations, *Stroud v. Johnston*, 139 F.2d 171 (9th Cir. 1943), *cert. denied*, 321 U.S. 796 (1944), and *Ex parte Weathers*, *supra*, both rely on prior authority that does not support their conclusion. Both rely on *Ex parte Wells*, *supra*. However, at issue in *Wells* was not a conditional commutation, but a simple commutation, which was referred to as a "conditional pardon." Also cited by *Weathers*, *supra*, at 295 was *United States v. Wilson*, 32 U.S. (7 Pet.) 150 (1833), a case involving a simple pardon. In like manner, *Hurt v. Moseley*, No. 71-1307 (10th Cir. Sept. 13, 1971), is based on inapposite authority. *Hurt*, an unpublished opinion affirming, without hearing, a district court's denial, also without hearing, of a pro se petition, based its support of conditional commutations on *Vitale*,

[12]Some confusion in this area and the occasional disregard of the distinction between commutations and pardons with non-penal conditions may be traced to the close historical relationship of the two concepts and the fact that the power to commute derived directly from the power to pardon. In the nineteenth century this Court ruled that the power to grant pardons included the power to grant conditional pardons, that is, to authorize release upon the performance of some conditions. United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833); *Ex parte Wells*, *supra*; Semmes v. United States, 91 U.S. 21 (1875). From conditional pardons the next step was for the President to impose penal "conditions" on pardons, that is, to pardon on condition that the prisoner serve some lesser punishment. In 1927 this Court discarded the fiction of calling such actions "conditional pardons" and expressly recognized them as

Lupo, and *Stroud*. In *Bishop v. United States*, 223 F.2d 582 (D.C. Cir. 1955), the court upheld the commutation of a death sentence to life imprisonment on the condition that the sentence be considered to run from the date of commutation. The court supported its ruling with one conclusory sentence citing no authority. *Id.* at 588.

Of the four Supreme Court decisions cited below in support of conditional commutations, not one is on point. Except for *Wells*, discussed above, none involved a commutation at all. At issue in *Semmes v. United States*, 91 U.S. 21, 27 (1875), was a pardon with a non-penal condition. In the only relevant language, the Court simply noted that the *pardons* may be "subject to conditions and exceptions. . . ." *United States v. Klein*, 80 U.S. 128, 142, 147 (1871), dealt with a general post-Civil War pardon and amnesty and stated simply that pardons may be granted on conditions. In *Ex parte Grossman*, 267 U.S. 87, 107, 120 (1925), the Court upheld the President's action *remitting* part of a sentence and ordering that the remainder of the sentence, a fine, be executed.

It is evident, as discussed in note 12, *supra*, that the terminology in many of the above cases is imprecise. The obvious reason is that many relate back to very early cases decided before commutations had become an accepted form of clemency or, indeed, in some cases, even before the term *commutation* had come into usage in judicial opinions. With this and the historical pattern of development of commutations in mind, it becomes clear that the authorities cited by the court below and the foundations on which they are based furnish no valid support for the notion that a President can commute a sentence to some lesser punishment not provided by law. To the contrary, prior decisions of

commutations. Biddle v. Perovich, *supra*. The earlier overlapping usage in terminology has caused a few courts to refer to all conditional pardons, including those with non-penal conditions, as "commutations." Such confusion is evident in some of the cases cited above.

this Court suggest that when commuting a sentence a President must select the lesser punishment from those provided by statute.

Indeed, in his Memorandum in Opposition the Solicitor General implicity acknowledges that the milder punishment substituted by commutation must have some statutory basis. In seeking to explain the government's position in *Biddle v. Perovich, supra,* that commutation is substitution of "a milder punishment known to the law . . . ," the Solicitor General states that "the plain meaning [of that statement] is that the punishment must be one *recognized by the law as a valid form of punishment.*" Memorandum for the Respondents in Opposition, n. 1, p. 4. But the Solicitor General's effort to suggest any statutory basis for the penalty imposed upon Petitioner consists, inexplicably, of the citation of a statute, the Narcotics Control Act of 1956, which covers only narcotics offenses and which does not authorize under any circumstances a no-parole-for-life penalty. The Solicitor General was unable to point to any statute – and there is none – authorizing a penalty of no-parole-for-life for any crime, much less for the crime of which Petitioner was convicted. Although the narcotics statute is wholly inapplicable, it does illustrate an important point: in prescribing penalties Congress is aware of the existence of the general parole statute, and it knows how to, and will, expressly and narrowly override that statute when it desires to do so.[13] Indisputably it has not authorized,

[13]The very limited no-parole provisions were written into the Narcotics Control Act for special reasons relating entirely to the nature of drug offenses and drug offenders. The legislative history shows that Congress deemed it imperative at that time to "remove from society . . . illegal traffickers," that this purpose would be "defeated" by parole eligibility and that rehabilitation of drug offenders would best be carried out "in a drug-free environment which makes institutional care essential." H.R. Rep. No. 2388, 84th Cong. 2d Sess., quoted at 2 U.S. Code Cong. & Ad. News 3281, 3284, 3286 (1956). After ten years, however, Congress found these limited exceptions to universal parole eligibility to be unduly restrictive of rehabilitation. Congress therefore enacted Title V of the Addict Rehabilitation Act of 1966 (80 Stat. 1449) which extended eligibility for parole, retroactively as well as prospectively, to violators of drug laws relating to marihuana.

in either military or civilian codes, the imposition of life imprisonment with no possibility of parole.

There is no question that in this case the President transgressed the limitations previously suggested by this Court. Life imprisonment with no possibility of parole, Schick's commuted sentence, is not provided by statute. It is, in fact, completely foreign to the system of law. Congress has authorized such a punishment nowhere in the Uniform Code of Military Justice; under military law it is an unlawful sentence. Even under civilian federal criminal statutes – to which Schick as a serviceman abroad was *not* subject – such a punishment is nowhere to be found. Thus, under the limitations of the President's constitutional power to commute sentences outlined above, that portion of the President's March 25, 1960 action ruling out eligibility for parole was unlawful.

B. The Action of the President in This Case Can Not Now Be Sustained Because It Has the Net Effect of Increasing Petitioner's Sentence Above the Maximum Lawful Punishment.

Even if the President is not constitutionally bound to commute to a punishment prescribed by law, his action in this case can not stand because it has the net effect of increasing Petitioner's sentence above the lawful maximum. Since commutation, by definition, involves a reduction in sentence, the President's action can not now be sustained.

Under the retrospective effect of *Furman*, the only constitutional punishment under article 118 of the UCMJ was life imprisonment *with* possibility of parole. Under present constitutional standards, applied retroactively, that is the only constitutional punishment that could have been imposed on Schick at trial. The action of the President imposing a sentence of life imprisonment without possibility of parole, has therefore, in retrospect, resulted in an increase over the lawful maximum punishment. Because the power to commute is, by definition, the power to reduce to a lesser punishment (*Biddle v. Perovich, supra*, at 487), this action can not now be upheld as a valid commutation. There is no dispute that under *Furman* the current President would have no authority to commute to life imprisonment without parole; under the retrospective application of *Furman*, action by President Eisenhower to the same effect can be given no greater validity.[14]

CONCLUSION

The Court should declare that the no-parole restriction imposed upon Petitioner is invalid and that the United States Parole Board is obliged promptly to consider Petitioner for parole.

In the foregoing, we have set forth a number of independently dispositive reasons why Petitioner is

[14]This point, it should be noted, is different from the argument of section I of this brief. In that section we show that, apart from any considerations of Presidential power, decisions on retroactivity require invalidation of continuing adverse consequences derived from the imposition of the death penalty. Even if that were not so, however, the action in question here can not be sustained because its net effect, in light of *Furman*, was to increase Petitioner's punishment above the lawful maximum, and this the President has no constitutional power to do.

entitled to this narrow but important form of relief. If we are correct on any one of these arguments, the decision of the lower court should be reversed and the sought relief ordered.

In addition to the legal arguments presented, we emphasize that the balance of interests in this case is strongly on the side of the relief sought by Petitioner. On the one side, no substantial interest would be thwarted by elimination of the no-parole requirement. All that would mean is that a commutee, like others, would be entitled to *consideration* for parole.

On the other side, there are powerful interests and arguments in favor of eliminating the no-parole restriction. It is anti-rehabilitative in the extreme and otherwise contravenes federal penal policy. It is discriminatory in its application to Petitioner. Its continued application runs directly against important principles of constitutional law. The penalty should not stand.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1974

MAURICE SCHICK, PETITIONER

v.

GEORGE J. REED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional provisions and statutes involved	2
Statement of the case	3
Summary of argument	6
Argument:	
I. President Eisenhower acted lawfully in commuting petitioner's death sentence to a sentence of life imprisonment without possibility of parole	8
II. This Court's decision in *Furman* v. *Georgia* does not affect petitioner's commuted sentence:	
A. *Furman* v. *Georgia* did not determine the validity of death sentences imposed by court-martial under military law	18
B. In no event would *Furman* v. *Georgia* be applied retroactively to void petitioner's 1954 death sentence	21
Conclusion	26

CITATIONS

Cases:	
Biddle v. *Perovich*, 274 U.S. 484	8, 12
Bradley v. *United States*, 410 U.S. 605	16
Collie, In re, 38 Cal. 2d 396, 240 P. 2d 275, certiorari denied, 345 U.S. 1000	18

556-930—74——1

Cases—Continued

	Page
Garland, Ex parte, 4 Wall. 333	15
Furman v. *Georgia*, 408 U.S. 278	2, 5, 6, 7, 18, 19, 20, 22, 23, 24, 25
Gideon v. *Wainwright*, 372 U.S. 335	23
Green v. *Gordon*, 39 Cal. 2d 230, 246 P. 2d 38, certiorari denied, 344 U.S. 886	18
Grossman, Ex parte, 267 U.S. 87	15
Hagelberger v. *United States*, 445 F. 2d 279	17
Hurt v. *Moseley*, No. 71-1307, decided September 13, 1971	18
Michigan v. *Payne*, 412 U.S. 47	22, 23
North Carolina v. *Pearce*, 395 U.S. 711	23
Parker v. *Levy*, No. 73-206, decided June 19, 1974	20
People v. *Anderson*, 6 Cal. 3d 628, 493 P. 2d 880	24
Robinson v. *Neil*, 409 U.S. 505	22
Schwab v. *Berggren*, 143 U.S. 442	8
State v. *Baker*, 81 Wash. 2d 281, 501 P. 2d 284	24
United States v. *Gravitt*, 15 C.M.R. 674	18
United States v. *Hagelberger*, 9 C.M.R. 226	17
United States v. *Hurt*, 22 C.M.R. 630	18
United States v. *Lee*, 16 C.M.R. 145	18
United States v. *Ragen*, 146 F. 2d 349	14
United States v. *Vigneault*, 9 C.M.R. 247	17
Walker, In re, 10 Cal. 3d 764, 518 P. 2d 1129	22, 23
Warden v. *Marrero*, No. 73-831, decided June 19, 1974	12, 16
William Wells, Ex parte, 18 How. 308	8

Constitution, statutes and regulation:

	Page
United States Constitution:	
Article I, Section 8	2
Article II, Section 2	2, 4, 6, 8, 10
Eighth Amendment	6, 8, 12, 22
Act of June 25, 1910, 36 Stat. 819	13, 16
Act of January 23, 1913, 37 Stat. 650	13

Constitution, statutes and regulation—Cont.

	Page
Uniform Code of Military Justice:	
Article 58, 10 U.S.C. 858	15
Article 64, 10 U.S.C. 864	21
Article 66, 10 U.S.C. 864	21
Article 67, 10 U.S.C. 867	21
Article 71, 10 U.S.C. 871	2, 4, 9, 10, 15, 21
Article 118, 10 U.S.C. 918	3, 4, 11, 13, 15, 21, 25
10 U.S.C. 952	15
18 U.S.C. (1940 ed.) 568	11
18 U.S.C. (1940 and 1946 ed.) 723	16
18 U.S.C. 2113(e)	10
18 U.S.C. 3570	11
18 U.S.C. 4202	3, 5, 15, 16
18 U.S.C. 4208(a)	16
21 U.S.C. 848	13
26 U.S.C. (1964 ed.) 7237(d)	13
39 Eliz. I c. 4	9
5 Geo. IV c. 84	9
Ariz. Rev. Stats., Tit. 31, § 443	14
West's Ann. Cal. Penal Code, §§ 644, 3050	14
Colo. Rev. Stat., ch. 39, Art. 18, § 4.7	14
22 D.C. Code 2404	16
24 D.C. Code 201c	16
Hawaii Rev. Stat., ch. 353, § 64	14
Idaho Code, Tit. 20, § 223	14
Iowa Code, ch. 247, § 247.5	14
Ky. Rev. Stat. 435.090	14
La. Rev., Stat., Tit. 15, §§ 571.7	14
4A Ann. Laws Mass., ch. 127, § 133A	14
9 Ann Laws Mass., ch. 265, § 2	13
Mich. Stat. Ann. § 28.2304	14
Miss. Code, § 47-7-3	14

Nev. Rev. Stat.:
ch. 200, §§ 030, 363, 320 — 14
ch. 200.030, § 6 — 13
ch. 200.320, § 1 — 13
ch. 200.363, §1(a) — 13
N.H. Rev. Stat., ch. 4, § 25 — 14
Baldwin's Ohio Rev. Code Ann., Tit. 29, § 2967.13 — 14
Okla. Stat., Tit. 57, § 332.7 — 14
Purdon's Penna. Stat. Ann., 1.4.61, § 331.21 — 14
S.D. C.L. 1967, § 23-60-15 — 14
Vt. Ann. Stat., Tit. 28, § 904 — 14
Michie's W. Va. Code, §§ 62-3-15, 61-2-14a, 61-2-25 — 14
Wyo. Stat., Title 7, § 325 — 14
Army Regulation 190-26, Ch. 1, para. 1-4 (a)(2) — 15
Miscellaneous:
41 Op. A.G. 251 — 17
H. Rep. No. 304, 80th Cong. 1st Sess — 17

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-5677

MAURICE SCHICK, PETITIONER

v.

GEORGE J. REED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (App. 59) is reported at 483 F. 2d 1266. The order of the district court (App. 57) is unreported. The several opinions of the Army Board of Review and of the Court of Military Appeals, and the action by the President, on petitioner's original conviction are reprinted at App. 4-35.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1973. A timely petition for rehearing and rehearing *en banc* was denied on October 1, 1973. The petition for a writ of certiorari was filed on October

31, 1973, and was granted on April 22, 1974. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the President's commutation of petitioner's court-martial sentence of death to a sentence of life imprisonment without benefit of parole was unlawful when made.

2. Whether *Furman* v. *Georgia,* 408 U.S. 238, retroactively invalidates the no-parole condition of the commutation.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, of the Constitution provides, in pertinent part:

> The Congress shall have Power * * * [t]o make Rules for the Government and Regulation of the land and naval Forces; * * *

Article II, Section 2, provides in pertinent part:

> The President shall be Commander in Chief of the Army and Navy of the United States, * * * * and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

10 U.S.C. 871, U.C.M.J., Art. 71, provides in pertinent part:

> (a) No court-martial sentence extending to death or involving a general or flag officer may be executed until approved by the President. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of the sentence or any part of the sentence, as approved by him, except a death sentence.

10 U.S.C. 918, U.C.M.J., Art. 118, provides in pertinent part:

> Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—(1) has a premeditated design to kill; * * * is guilty of murder, and shall suffer * * * death or imprisonment for life as a court-martial may direct.

18 U.S.C. 4202 provides:

> A Federal prisoner, other than a juvenile delinquent or a committed youth offender, wherever confined and serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years.

STATEMENT OF THE CASE

The facts are undisputed. Petitioner, Maurice Schick, then a master-sergeant in the United States Army, was tried by general court-martial in March 1954 for the murder of an eight-year-old girl at a dependent housing project near Camp Zama, Tokyo, Japan. The victim was the daughter of one of the officers assigned to the camp. Petitioner admitted killing the child by choking and drowning her. His defense was that he was insane at the time he committed the crime. Psychiatric testimony was presented by both the prosecution and defense at trial. The court-martial rejected petitioner's defense of in-

sanity, convicted him of premeditated murder under Article 118, Uniform Code of Military Justice (10 U.S.C. 918, *supra*, p. 3), and sentenced him to death (App. 4–6).

An Army board of review affirmed the conviction and sentence (App. 4). The case was then forwarded to the Court of Military Appeals, which, after receiving a report based on further psychiatric examination of petitioner, remanded the case to the board of review for reconsideration of the sanity issue (App. 9). After considering additional professional evaluation of petitioner's psychiatric reports, as well as the earlier psychiatric evaluations, the board of review again affirmed the findings and sentence (App. 12). The Court of Military Appeals affirmed by a vote of 2 to 1 (App. 20). As required by statute in all cases where the death sentence has been imposed (10 U.S.C. 871 (a), U.C.M.J., Art. 71(a), *supra*, p. 2), the case was forwarded to the President for final review.

In 1960 President Eisenhower, exercising his authority under Article II, Section 2, of the Constitution, commuted petitioner's death sentence to "confinement at hard labor for the term of his natural life," with the express condition that he "shall never have any rights, privileges, claims, or benefits arising under the parole and suspension or remission of sentence laws of the United States and the regulations promulgated thereunder * * *" (App. 35). The President then ordered the sentence executed, as modified, and directed that petitioner be committed to the custody of the Attorney General (*ibid*). Petitioner was

accordingly dishonorably discharged from the Army, and transferred to the federal penitentiary at Lewisburg, Pennsylvania.

Petitioner has served 20 years of his life sentence; he would have been eligible for parole consideration in March, 1969 but for the provision in President Eisenhower's commutation of his death sentence that the parole statutes not apply to petitioner. See 18 U.S.C. 4202, *supra*, p. 3.

In 1971, petitioner sought a declaratory judgment in the United States District Court for the District of Columbia to require the United States Board of Parole to consider him for parole (App. 36). On November 9, 1971, Judge George L. Hart, Jr., after hearing, dismissed the case for lack of subject matter jurisdiction (App. 41). The court of appeals summarily reversed and remanded the case to the district court for further action (App. 56). On March 29, 1972, Judge Hart granted the Board of Parole's motion for summary judgment (App. 57). The court of appeals affirmed, one judge dissenting (App. 59). The panel was unanimous in upholding the President's initial power to commute a death sentence to life imprisonment without possibility of parole (App. 60–63, 65), but split on the question of the retroactive application of *Furman* v. *Georgia*, 408 U.S. 238. The majority held that *Furman* should not be applied retroactively so as to void the no-parole condition of the commutation since, in the absence of Presidential approval, petitioner was never effectively sentenced to death, and, at all events, the tentative death sentence was superseded long before *Furman* was decided. Judge

536-930—74——2

Wright, in dissent, argued that *Furman* required vacation of petitioner's death sentence and substitution of "the only other sentence which lawfully could have been imposed—life imprisonment with the possibility of parole" (App. 65).

SUMMARY OF ARGUMENT

1. President Eisenhower's 1960 commutation of petitioner's 1954 death sentence to life imprisonment without parole was lawful and well within the power "to grant reprieves and pardons" accorded the President by Article II, Section 2, of the Constitution. Petitioner's contention that the President has the power to commute only to a lesser punishment provided by Congress as an alternative penalty for the particular offense is supported neither by decisions of this Court nor by considerations of policy. We recognize that the President in commuting must actually reduce the sentence, and that his power to commute is limited by the Eighth Amendment. Assuming, moreover, that, other constitutional restrictions aside, the President cannot commute to a sentence wholly alien to our law, that proposition would not control this case: life imprisonment without parole is provided for by statute in federal law as well as in the law of twenty states. Furthermore, Congress has made its intention clear, both in the original parole statute and in the statute which sent petitioner's case to the President, that the President's power to commute should be unfettered by Congressional enactments.

2. This Court's decision in *Furman* v. *Georgia*, 408 U.S. 238, was rendered while the present case was pending on appeal, and the possibility of its direct applicability to this case was only brought to the attention of the court of appeals at oral argument. Because of the manner in which the question arose, no one focused upon the underlying question of whether *Furman* applied at all to death sentences imposed by courts-martial. This issue was not involved in *Furman*, and has never been decided by this Court nor by any court of appeals. Military discipline requires a separate jurisprudence with its own unique need for the death penalty for purposes of deterrence. Moreover, military law provides for three levels of review of the propriety of death sentences, including in every case review by the President. Accordingly the considerations which prompted some members of majority in *Furman* may not apply to the law governing the military. However, should the Court deem it necessary to decide this issue, we would urge a remand so that a full evidentiary record can be made.

3. In any event, even if *Furman* should be held applicable to the military, it should not be applied retroactively in a manner to void a death sentence, later commuted, which was legal when imposed. To go so far, we submit, would ignore the one consistent theme of the five concurring opinions in *Furman*, namely, that only by 1972, the date the case was decided, had moral attitudes and practices in this country developed to the point where the death

penalty, as imposed pursuant to discretionary statutes, violated the Eighth Amendment.

ARGUMENT

I. PRESIDENT EISENHOWER ACTED LAWFULLY IN COMMUTING PETITIONER'S DEATH SENTENCE TO A SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE

The President's power to commute criminal sentences derives from that provision of Section 2 of Article II of the Constitution which authorizes the Chief Executive "to grant reprieves and pardons for offenses against the United States." To be sure, the Constitution does not use the word "commutation" and the question was early put to this Court whether the President had power under the "reprieves and pardon" clause to grant less than a full pardon, as by commuting a death sentence to a sentence of life imprisonment. The issue was settled in *Ex parte William Wells,* 18 How. 308, where the Court upheld a pardon "* * * upon condition that [Wells] be imprisoned during his natural life; that is, the sentence of death is hereby commuted to imprisonment for life in the penitentiary of Washington." *Id.* at 308, 315. See, also, *Schwab* v. *Berggren,* 143 U.S. 442, 451; *Biddle* v. *Perovich,* 274 U.S. 480, 487. So much is common ground: that the President has constitutional power to grant a commutation of sentence, defined (to borrow petitioner's words, Br. 23) as "the substitution of a lesser, different type of punishment for the punishment actually imposed * * * at trial."[1]

Petitioner argues, however, that the President is without power to commute to any lesser punishment not expressly provided by Congress as an alternative penalty for the particular offense (Br. 24–33). We find no basis for any such limitation of the President's pardon power.

Certainly, the suggested restriction is not required by prior decisions of this Court. Indeed, in *Wells, supra,* the Court approved commutation of a death sentence to "imprisonment for life in the penitentiary of Washington" without thinking it necessary to point to any Act of Congress specifically providing for such a penalty. The language petitioner quotes (Br. 27) to the effect that in England the King was not permitted (after a certain date) to commute sentences to transportation or exile, is a reference to specific acts of Parliament regulating those two punishments (39 Eliz. I c. 4 and 5 Geo. IV c. 84, see 18 How. at 313) which have no counterpart in this country. In light of the serious constitutional question presented, it would be extravagant to read that

[1] Like petitioner, we treat President Eisenhower's action in this case as an exercise of his constitutional power to commute sentences—existing independently of 10 U.S.C. 871(a). That, it seems to us, is the plain implication of the document by which the President changed respondent's sentence. See App. 35. In this respect, we accept the analysis of the dissenting opinion below (App. 71) to the effect that Article 71(a)—at least as applied here—merely requires the President, *sua sponte*, to consider executive clemency.

passage as condoning any legislative attempt to control the President's pardon power.

The *Biddle* opinion no more supports the proposed limitation. Petitioner quotes Mr. Justice Holmes as saying: "The only question is whether the substituted punishment was authorized by law * * *" (Br. 26). But he omits what immediately follows: "* * *—here, whether the change is within the scope of the words of the Constitution, Article II, § 2: 'The President * * * shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.' " 274 U.S. at 487. Thus, the controlling law that Justice Holmes looked to was the Constitution, not the statute creating the offense.

Nor is there any sound reason of policy arguing in favor of the suggested restriction of Executive power. Suppose a statute imposing a mandatory death penalty for a particular offense (which we assume, for present purposes, *Furman* does not invalidate): is the President precluded from commuting the sentence to life imprisonment because Congress has not provided that alternative in the particular case? So, also, if petitioner's contention is accepted, it must mean that executive clemency cannot reduce a prison term below the minimum provided by law—or at all when the judge has imposed that minimum sentence (see, *e.g.*, 18 U.S.C. 2113(e)). That would make nonsense of the controlling statute in this case (10 U.S.C. 871(a), *supra*, p. 2) which authorizes the President, in the event of *every* sentence affecting a general or flag officer, to approve "such part, amount,

or commuted form of the sentence as he sees fit"—presumably regardless of what minimum is established by the relevant article of the Uniform Code of Military Justice. And see 18 U.S.C. 568 (1940 ed., now 18 U.S.C. 3570) confirming the President's "full discretionary power to pardon or remit, *in whole or in part*" either portion of a sentence that includes both a fine and imprisonment. Only if the Constitution absolutely compelled it, would one adopt the inflexible rule petitioner proposes, the practical effect of which would often be to deter *any* exercise of Executive clemency. In fact, nothing in Article II restricts the commutation power in this way.[2]

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[2] There is no analogy between the President's options when exercising the constitutional power of commutation and the alternatives open to a court on resentencing. The latter is bound to impose a penalty prescribed by the statute defining the offense; the President is not. Thus, in this case, even if the death sentence originally imposed were deemed a nullity in light of *Furman* and the military courts were bound to substitute a sentence of life imprisonment with normal eligibility for parole, that would not necessarily be the end of the matter—contrary to what Judge Wright assumed, dissenting below (App. 66–67). The President would still be free to exercise his constitutional discretion to reduce that sentence. And, of course, any commutation of the life sentence (as opposed to a suspension of the sentence or a full pardon) would necessarily involve the substitution of a sentence *not* prescribed by Article 118.

We find it difficult to believe that petitioner would oppose Presidential action which commuted his sentence to, say, twenty years' imprisonment, thus effecting his immediate and unconditional release. Yet, the logic of his argument is that such a step would be unlawful because, besides death, the only penalty specified in Article 118 is life imprisonment.

This is not to say that there are no limits to the President's power of commutation. First, of course, the substituted penalty cannot be more severe than that provided by the original sentence.[3] And, whether harsher or not, the new penalty must not itself be cruel and unusual in violation of the Eighth Amendment,[4] nor overstep any constitutional boundary. It may be, moreover, that the President cannot create novel or bizarre punishments, wholly alien to our law. But there is nothing of that kind here. All President Eisenhower did was to commute petitioner's death sentence to a wholly familiar alternative penalty,

[3] We take it as settled that life imprisonment, even without possibility of parole, is a lesser penalty than death. See *Biddle* v. *Perovich*, *supra*, 274 U.S. at 486. If that option is no longer available today, it is only because the death penalty prescribed by Article 118 has been effectively eliminated by the *Furman* decision, leaving only life imprisonment with normal parole eligibility as the sole permissible initial sentence. We recognize, of course, that a no-parole condition realistically must be viewed as increasing the "penalty" or "punishment." See *Warden* v. *Marrero*, No. 73-831, decided June 14, 1974, slip op., pp. 8-10.

[4] Petitioner suggests in a footnote that life imprisonment without benefit of parole may be a cruel and unusual punishment as imposed in this case (Br. 29, note 11). This Court has never held such a sentence to violate the Eighth Amendment, and there is no evidence in the record to support the proposition that the sentence here, or similar sentences, have been wantonly imposed, imposed in a discriminatory manner, or that they serve no useful purpose in terms of deterrence or protection of the public. This is not a question that should be decided on the record of this case, without the opportunity to present expert evidence on the usefulness and effect of such sentences. Indeed, it is not an issue presented by the petition for certiorari, which, in relevant part, challenges the substituted sentence only as "not authorized by law" (Pet. 2, Question 2).

indeed one prescribed by the statute under which he was convicted (10 U.S.C. 918), namely, imprisonment for life. The only feature of the commutation that can be complained about is the allegedly "original" condition that the parole statutes should not apply to petitioner.

The question, then, is whether this no-parole restriction amounts to the invention of a new punishment, entirely unknown to our law. Plainly, it does not. For most of the Nation's history, premature release by way of parole was the exception, not the rule. It was not until 1910 that automatic eligibility for parole was generally made available in the federal system (Act of June 25, 1910, 36 Stat. 819), and, for those sentenced to life imprisonment, not until three years later (Act of January 23, 1913, 37 Stat. 650). At all events, one can point to current or very recent provisions of both federal and state law that deny parole in some circumstances. *E.g.*, 26 U.S.C. (1964 ed.) 7237(d); 21 U.S.C. 848(c) (continuing criminal enterprise involving narcotics); 9 Ann. Laws Mass., ch. 265, § 2 (first-degree murder); Nev. Rev. Stat., Tit. 16, ch. 200.030, § 6, ch. 200.320, § 1, ch. 200.363, § 1(a)(1973) (first degree murder, kidnapping, and forcible rape).

Nor is there anything foreign to our system of jurisprudence in imposing a no-parole condition in the case of a life sentence. Indeed, current federal law permits a life sentence without possibility of parole for some narcotic offenders. 21 U.S.C. 848 (a), (c). And there

are no less than 20 states in which parole eligibility—at least without the Governor's approval—is expressly denied to all or some who are sentenced to life imprisonment.[5] Moreover, even where there is no statutory rule, it is not unusual for a prisoner to serve out his remaining life in prison. In the federal system, that may happen more or less predictably because, when convicted, his life expectancy does not exceed fifteen years, or because it is foreseeable that parole will be denied. In many state systems, a very long sentence will assure that result. See, *e.g.*, *United States* v. *Ragen*, 146 F. 2d 349, 351–352 (C.A. 7). The upshot is that imprisonment for life is not an uncommon occurrence in American criminal law.

[5] Ariz. Rev. Stats., Tit. 31, § 443 (all life sentences); West's Ann. Cal. Penal Code, §§ 644, 3050 (kidnapping for extortion and robbery); Colo. Rev. Stat., ch. 39, Art. 18, § 4.7 (assault by prisoners); Hawaii Rev. Stat., ch. 353, § 64 (first degree murder); Idaho Code, Tit. 20, § 223 (murder with sexual attack); Iowa Code, ch. 247, § 247.5 (all life sentences); Ky. Rev. Stat. 435.090 (rape); La. Rev. Stat., Tit. 15, § 571.7 (all life sentences); 4A Ann. Laws, Mass., ch. 127, § 133A (first degree murder); Mich. Stat. Ann. § 28.2304 (first degree murder); Miss. Code, § 47–7–3 (confirmed and habitual criminal); Nev. Rev. Stat., ch. 200, §§ 030, 363, 320 (first degree murder, rape, kidnapping in first degree); N.H. Rev. Stat., ch. 4, § 25 (all life sentences); Baldwin's Ohio Rev. Code Ann., Tit. 29, § 2967.13 (first degree murder); Okla. Stat. Tit. 57, § 332.7 (all life sentences); Purdon's Penn. Stat. Tit. 61, § 331.21 (all life sentences); S.D. C.L. 1967, §23–60–15 (all life sentences); Vt. Ann. Stat., Tit. 28, § 904 (all life sentences); Michie's W. Va. Code, §§ 62–3–15, 61–2–14a, 61–2–15 (first degree murder, aggravated kidnapping and rape); Wyo. State., Tit. 7, § 325 (all life sentences).

We need look no further. No congressional expression could bind the Chief Executive in this matter, directly confided to him by the Constitution. "This [pardon and commutation] power of the President is not subject to legislative control. * * * The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions". *Ex parte Garland*, 4 Wall. 333, 380. The principle is part of the system of separation of powers. *Ex parte Grossman*, 267 U.S. 87, 119–122. Quite properly, Congress has observed that limitation in the statutes relevant here.

We have already noticed 10 U.S.C. 871(a), which expressly confirms the President's power to commute a sentence that must come to him for review to *any* lesser sentence, "as he sees fit." No restriction is to be found there. Nor does the statute creating the military offense of murder (10 U.S.C. 918, *supra* p. 3) circumscribe the commutation power in any way relevant to this case. Petitioner presumably would contend, and we would dispute, that this provision leaves the President only the single option of life imprisonment when commuting a death sentence. But what *is* clear is that Article 918 itself does not prejudice the question of eligibility for parole. We turn then, to the general parole statute, 18 U.S.C. 4202 (*supra*, p. 3).[6]

[6] This provision would govern petitioner's case, but for the no-parole condition, because he is confined in a civilian penitentiary. See 10 U.S.C. 858. Had he been kept in military custody, a comparable parole regulation would have been applicable. See 10 U.S.C. 952; Army Regulation 190–26, Ch. 1, para. 1–4(a)(2) (March 20, 1972).

Here we encounter what seems, at first blush, a universal rule entitling every federal prisoner to claim premature release. It is, of course, no more than an *eligibility* for parole, not a promise that it will be granted. But, more important, the formula laid down in the statute is not in fact invariable. Another section of the Criminal Code expressly empowers judges at sentencing to hasten parole eligibility. See 18 U.S.C. 4208(a). See, also, 24 D.C. Code 201c. And, as we have noted, there are provisions barring parole altogether in certain cases (*e.g.*, 21 U.S.C. 848(c)), or delaying eligibility (*e.g.*, 22 D.C. Code 2404). This Congressional power to make exceptions is beyond question. See *Bradley* v. *United States*, 410 U.S. 605; *Warden* v. *Marrero*, No. 73-831, decided June 19, 1974. Surely, it must follow that the President, exercising independent constitutional authority, is equally free to do so.

At all events, when we look at the history of the parole statute, it is clear Congress was careful not to attempt any interference with the exercise of Executive clemency. Indeed, as originally enacted, 18 U.S.C. 4202 contained the following provision (Act of June 25, 1910, Section 10, 36 Stat. 819, 821):

> That nothing herein contained shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case * * *.[7]

[7] This provision appeared in Title 18, U.S.C., Section 723, in the 1940 and 1946 editions. Although the provision does not appear in the 1948 revision of Title 18, the Reviser's note to Section 3570 (H. Rep. No. 304, to accompany H.R. 3190, House Judiciary Committee, 80th Cong., 1st Sess., at page A171) states:

"Based on title 18, U.S.C., 1940 ed., §§ 568, 723 * * *.

"Words 'pardon or' before 'remit' and 'pardoned or' before 'remitted', were omitted as unnecessary in view of the pardoning power of the President under Const. Art. 2, § 2, cl. 1. 'The power of the President is not subject to legislative control.' *Ex parte Garland*, 1866, 4 Wall. 380. (See also notes of decisions, note 5, U.S.C.A. Const. Art. 2, § 2, cl. 1.)"

No doubt, that language was primarily addressed to the situation in which a Presidential commutation directed release of a prisoner *before* he would be eligible for parole under the statute. But, literally and logically, it applies equally to the converse also. In both cases, the underying principle is simply that the Presidential prerogative to grant clemency is not subject to legislative control.

Finally, we note that what was done here is far from unprecedented. It is reported that President Wilson at least twice imposed a no-parole condition in commuting sentences, the first instance involving the substitution of life imprisonment for a death sentence, as here. See 41 Op. A. G. 251, 254. Before this case, President Eisenhower, after advice from Attorney General Brownell (41 Op. A. G. 251), took like action in commuting at least five military death sentences. See *United States* v. *Vigneault*, 9 C.M.R. 247; *United States* v. *Hagelberger*, 9 C.M.R. 226;[8]

[8] Although not challenging the no-parole provision of his commutation, the prisoner sought credit for time served before his death sentence was commuted to 55 years' imprisonment. That claim was rejected by both the district court and the court of appeals. *Hagelberger* v. *United States*, 445 F. 2d 279 (C.A. 5).

United States v. *Gravitt*, 15 C.M.R. 674; *United States* v. *Lee*, 16 C.M.R. 145; *United States* v. *Hurt*, 22 C.M.R. 630. On the last occasion, the no-parole clause was challenged and sustained by the Court of Appeals for the Tenth Circuit. *Hurt* v. *Moseley*, No. 71-1307, decided September 13, 1971 (unreported). And, in two cases, the California Supreme Court has approved such a condition imposed by the Governor in commuting death sentences. *In re Collie*, 38 Cal. 2d 396, 240 P. 2d 275, certiorari denied, 345 U.S. 1000; *Green* v. *Gordon*, 39 Cal. 2d 230, 246 P. 2d 38, certiorari denied, 344 U.S. 886.

We conclude that, at the time, President Eisenhower's action in commuting petitioner's death sentence to one of life imprisonment without possibility of parole was entirely lawful. The remaining question, to which we now turn, is whether this Court's decision in *Furman* v. *Georgia*, 408 U.S. 238, has retrospectively invalidated the no-parole condition attached to petitioner's commuted sentence.

II. THIS COURT'S DECISION IN *FURMAN* V. *GEORGIA*, 408 U.S. 238, DOES NOT AFFECT PETITIONER'S COMMUTED SENTENCE

A. *FURMAN* V. *GEORGIA* DID NOT DETERMINE THE VALIDITY OF DEATH SENTENCES IMPOSED BY COURTS-MARTIAL UNDER MILITARY LAW

This Court's decision in *Furman* v. *Georgia*, *supra*, was rendered while the present case was pending on appeal and was brought to the attention of the court of appeals. But, at the argument, the parties and the court were concerned primarily with the retroactive application of the decision to a death sentence already commuted:[9] No one focussed on the underlying question of whether *Furman* applies at all to convictions by courts-martial. Of course, that issue need not be reached if (as we believe) the court below was correct in holding that *Furman* can in no event affect an already commuted sentence. On the other hand, should this Court disagree, then the question of *Furman's* application in a military setting could become relevant, and we accordingly deal with it here.

The *per curiam* opinion in *Furman* holds "* * * that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." 408 U.S. at 239-240. That unexplicated decision must, however, be read together with the separate opinions of those Members of the Court who made up the majority. Some of the reasons given by those who joined in the disposition of the cases were: that capital punishment, as presently administered, serves no valid governmental purpose (*id.* at 312-314, White, J., concurring); that capital punishment is ap-

[9] Although *Furman* was cited by petitioner in his court of appeals brief, it was invoked only by way of analogy for the propositions that life imprisonment without parole was antirehabilitative (Br. 18), amounted to cruel and unusual punishment (Br. 27, 29, 30), and deprived him of equal protection of the laws (Br. 33). At oral argument, as the court of appeals noted (App. 63-64), petitioner also advanced the argument that *Furman* should be applied retroactively to void his 1954 death sentence. Because of the manner in which the issue arose, the question of the retroactivity of *Furman*, as well as the underlying question of its applicability at all to the military, were not briefed by the parties.

plied in a way which discriminates against minorities and the poor (*id.* at 256–257, Douglas, J., concurring); that capital punishment is imposed wantonly and freakishly (*id.* at 310, Stewart, J., concurring). The question arises whether these rationales apply to judgments of courts-martial, bearing in mind that none of the cases before the Court involved a military conviction.[10]

We begin with the Court's admonition in *Parker* v. *Levy*, No. 73–206, decided June 19, 1974, that "'[m]ilitary law * * * is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment'" (*id.*, slip op. at 9). Nowhere is this separateness more real than where capital punishment is concerned. Members of the military deal regularly with deadly weapons. They are often in foreign countries under situations of tension or war. They are required to obey orders that imperil life or limb. In such circumstances, the deterrent of capital punishment in the event of disobedience may be both more necessary and more appropriate than in a civilian setting.

What is more, the system under which death sentences are imposed and confirmed is very different

[10] The Court majority in *Furman* made no reference to military cases. The matter was only mentioned in dissent. Both Mr. Justice Blackmun and Mr. Justice Powell were concerned that the decision might invalidate the death penalty provisions of the Uniform Code of Military Justice (408 U.S. at 412, 417–418), Justice Blackmun noting that such a result, if it follows from *Furman*, would be accomplished "without a passing reference to the reasons, or the circumstances, that prompted [the] enactment [of these provisions]." 408 U.S. at 412.

from the civilian experience criticized in *Furman*. Congress has provided that the appropriateness of every death sentence imposed by a court-martial must be reviewed at the following three levels: first, by the convening authority (Article 64, U.C.M.J.; 10 U.S.C. 864), second, by the Court of Military Review (Article 66, U.C.M.J.; 10 U.S.C. 866), and finally, by the President (Article 71, U.C.M.J.; 10 U.S.C. 871).[11] This extensive process, ending in each case with the President, serves to prevent discriminatory or wanton use of the penalty.

These considerations suggest that *Furman* ought not be held automatically applicable to courts-martial proceedings. Should the Court deem it necessary to reach the issue, we would urge a remand of the case so that a full evidentiary record can be made. Such an important constitutional question ought not be decided, we submit, on the present inadequate record.

B. IN NO EVENT SHOULD *FURMAN* V. *GEORGIA* BE APPLIED RETROACTIVELY TO VOID PETITIONER'S 1954 DEATH SENTENCE

For the purposes of the present argument, we assume, first, that the death sentence imposed by the court-martial in 1954, if it had been left undisturbed, could not now be carried out, and, second, that today, the most severe sentence that could be imposed for a violation of Article 118 would be life imprisonment with the usual eligibility for parole.. But, in our view,

[11] There is, in addition, a mandatory review of the conviction by the Court of Military Appeals when a death sentence has been upheld. Article 67, U.C.M.J., 10 U.S.C. 867. That court, however, has no power to vary the sentence.

it does not follow, in the actual circumstances of the case, tnat *Furman* voids the 1954 death sentence and the no-parole condition of commutation imposed in 1960. The "retroactivity" of the *Furman* decision does not, we submit, carry so far.

While this Court has used the term "retroactive" in characterizing the application of *Furman,* that has only been to prevent execution of a pending death sentence. *Michigan* v. *Payne,* 412 U.S. 47, 57, n. 14; *Robinson* v. *Neil,* 409 U.S. 505, 508. We are aware of no case which applies *Furman* retroactively in any other context.[12] Furthermore, an analysis of the five concurring opinions in *Furman* reveals that reaching back years, except to prevent present execution, would be inconsistent with the reasoning behind the decision. None of the Justices subscribing to the result intimated that the death penalty had always been constitutionally invalid as cruel and unusual. Rather, each concurring opinion expressed the view that, because of changing moral standards or changing practices, the death penalty must now be viewed as cruel and unusual.

Mr. Justice Douglas noted that the Eighth Amendment "'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society'" and that the proscription against cruel and unusual punishments "' may acquire meaning as public opinion becomes enlighted by a humane justice'". *Furman, supra,* 408 U.S. at 242 (citations

[12] But see *In re Walker*, 10 Cal. 3d 764, 518 P. 2d 1129 (Sup. Ct. Cal.), discussed *infra*, n. 15.

omitted). Mr. Justice Brennan stated that the death penalty is "unacceptable to contemporary society" (*id.* at 277) and that the real question was "whether the deliberate infliction of death is *today* consistent" with the Eighth Amendment. *Id.* at 285 (emphasis added). He concluded that "[t]oday death is a uniquely and unusually severe punishment." *Id.* at 305. Mr. Justice Stewart used the years 1967 and 1968 as his point of reference in concluding that the death penalty was applied "wantonly and freakishly". *Id.* at 309–310. Mr. Justice White condemned the death penalty "as it is presently administered". *Id.* at 312–313. And Mr. Justice Marshall concluded that the death penalty is "morally unacceptable * * * at this time in * * * history." *Id.* at 360.[13] The rationale of *Furman,* therefore, does not justify reaching back twenty years to invalidate a death penalty commuted more than 14 years ago.

In arguing for retroactivity, petitioner analogizes *Furman* to *Gideon* v. *Wainwright,* 372 U.S. 335 (Br. 18–21), which has been accorded full retroactive effect to undo all adverse legal consequences from past convictions obtained without the assistance of counsel. But *Gideon* and *Furman* are not analogous.[14] *Gideon,*

[13] See also the dissenting opinion of Mr. Justice Powell at 434–436.

[14] More closely analogous to *Furman* is *Michigan* v. *Payne*, *supra*, 412 U.S. at 47, which held that *North Carolina* v. *Pearce*, 395 U.S. 711 (limiting the power of a judge to impose a more severe sentence following retrial and conviction after a successful appeal), was nonretroactive.

by recognizing the necessity for assistance of counsel at trial for a reliable determination of guilt or innocence, placed in question the accuracy of all past determinations of guilt where the defendant did not have a lawyer. Thus, a retroactive application was necessary to effectuate its purpose. In *Furman*, on the other hand, the Court only held that by 1972 the death penalty, a punishment long used with the Court's approval, had become cruel and unusual in light of contemporary morals and practices. The effectuation of *Furman* requires no action with respect to a death sentence that has long since been undone by Presidential commutation.[15]

These considerations also dispose of petitioner's alternative contention (Br. 33–34) that, in light of

[15] The state cases cited by petitioner (Br. 13–15) are not persuasive. *State* v. *Baker*, 81 Wash. 2d 281, 501 P. 2d 284, is inapposite. There the defendant was, at the time *Furman* was decided, subject to a pending death sentence, which had merely been deferred. The Supreme Court of Washington held that the issue of whether a trial court could defer the imposition of a death sentence was moot, since under *Furman* the state could not impose the death penalty on the defendant.

In re Walker, 10 Cal. 3d 764, 518 P. 2d 1129, lends some support to petitioner's position on the retroactivity of *Furman*, because, on substantially similar facts (a 1961 commutation of a 1947 death sentence), the Supreme Court of California rejected arguments analogous to those which we assert here. The critical distinction, however, is that the California Court was not construing *Furman*, but, rather, its own prior decision in *People* v. *Anderson*, 6 Cal. 3d 628, 493 P. 2d 880 (in which, before *Furman*, the death penalty was held to be cruel and unusual punishment under the California Constitution). Obviously, whether right or wrong, that ruling is no precedent here, in a case which involves the application of a decision by this Court construing the federal Constitution.

Furman, President Eisenhower's action must be viewed as substituting a more *severe* penalty than the original sentence, in violation of the principle of commutation. The flaw in this argument is the same: the assumption that the death penalty was unconstitutional when originally imposed in 1954, and that the only legal sentence then was life imprisonment with eligibility for parole. But *Furman* holds nothing of the sort. Because it would today be impermissible to execute even a twenty-year-old death sentence does not imply that the judgment was invalid when rendered.[16]

[16] Should the Court disagree and accept petitioner's *Furman* argument, we submit the proper disposition would be to vacate the original death sentence and the President's commutation thereof, with the consequence that the alternative penalty provided by Article 118—life imprisonment with normal eligibility for parole—would be substituted. While, in this case, the practical result is the same, it would be wrong, we suggest, simply to strike the no-parole condition of the commutation. Analytically, if *Furman* applies, the substituted sentence must be attributed to Article 118, not to any action of the President.

A somewhat different disposition of the case is called for if the Court were to accept petitioner's alternative argument that, independently of *Furman*, the President cannot attach a no-parole condition to a commutation—at least when the substituted sentence is life imprisonment. Even then, however, we submit striking the restriction alone would not be correct. Indeed, it may well be that the President would have denied clemency altogether if he could not foreclose parole. In those circumstances, the appropriate course would be to set aside the whole of the President's action. The result would be to revive the original death sentence, the execution of which might be prevented by *Furman* (if it applies to military cases) or by a fresh commutation.

CONCLUSION

We do not argue that petitioner should spend the rest of his life in prison or that he should never be relieved of the condition of his commutation and allowed to seek parole. If there are reasons of compassion or rehabilitation that would justify further commutation of the sentence, petitioner is free to request it of the President, who is not bound by the action of his predecessor. See 41 Op. A. G. at 251. Our contention is only that the President's commutation of petitioner's sentence was valid when rendered, remains valid, and should be changed only by Presidential action.

It is therefore respectfully submitted that the judgment of the court of appeals should be affirmed.

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On Writ of Certiorari to the United States Court of Appeals For the District of Columbia

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REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

	Page
ARGUMENT	1
I. THE GOVERNMENT'S ARGUMENT THAT FURMAN v. GEORGIA DOES NOT INVALIDATE THE NO-PAROLE PROVISION OF PETITIONER'S COMMUTED SENTENCE IS ERRONEOUS	1
A. The Eighth Amendment Prohibition Against Cruel and Unusual Punishments Applies With Full Force to the Military	2
B. The Retrospective Application of Furman v. Georgia Reaches Petitioner's Sentence	18
II. THE PRESIDENT EXCEEDED HIS CONSTITUTIONAL POWER TO COMMUTE BECAUSE THE COMMUTED PUNISHMENT WAS NOT PROVIDED BY STATUTE	19
CONCLUSION	22

TABLE OF AUTHORITIES

CASES:

Allen v. VanCantfort, 436 F.2d 625 (1st Cir.), *cert. denied*, 402 U.S. 1008 (1971) 17
Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965) 8
Augenblick v. United States, 377 F.2d 586 (Ct. Cl. 1967), *rev'd on other grounds*, 393 U.S. 348 (1969) 8
Benjamin v. Hunter, 169 F.2d 512 (10th Cir. 1948) ... 4
Biddle v. Perovich, 274 U.S. 480 (1927) 21, 22
Burns v. Lovett, 202 F.2d 335 (D.C. Cir. 1952), *aff'd sub nom*, Burns v. Wilson, 346 U.S. 137 (1953) ... 8
Burns v. Wilson, 346 U.S. 137 (1953) 6, 8
Caruso v. Toothaker, 331 F. Supp. 294 (M.D. Pa. 1971) 4
Easley v. Hunter, 209 F.2d 483 (10th Cir. 1953) 4, 8
Ex parte Quirin, 317 U.S. 1 (1942) 7
Ex parte Wells, 59 U.S. (18 How.) 307 (1855) 21
Furman v. Georgia, 408 U.S. 238, *rehearing denied*, 409 U.S. 902 (1972) 1, 2, 3, 5, 6, 14, 18, 19

Page

Harris v. Ciccone, 417 F.2d 479 (8th Cir. 1969), *cert. denied*, 397 U.S. 1078 (1970) 8
In re Baker, 267 So.2d 331 (Fla. 1972) 18
Kahn v. Anderson, 255 U.S. 1 (1921) 7
Kasey v. Goodwyn, 291 F.2d 174 (4th Cir. 1961), *cert. denied*, 368 U.S. 959 (1962) 8
Kauffman v. Secretary of Air Force, 415 F.2d 991 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970) ... 8
McCurdy v. Zuckert, 359 F.2d 491 (5th Cir.), *cert. denied*, 385 U.S. 903 (1966) 8
Mickey v. Barclay, 328 F. Supp. 1108 (E.D. Pa. 1971).. 4
Miranda v. Arizona, 384 U.S. 436, *rehearing denied*, 385 U.S. 890 (1966) 10
Noyd v. Bond, 395 U.S. 683 (1969) 9
O'Callahan v. Parker, 395 U.S. 258 (1969) 7
Parker v. Levy, 42 U.S.L.W. 4979 (June 19, 1974) ... 14
Powers v. Hunter, 178 F.2d 141 (10th Cir. 1949), *cert. denied*, 339 U.S. 986, *rehearing denied*, 340 U.S. 847 (1950) 4
Reid v. Covert, 354 U.S. 1 (1957) 7
Relford v. Commandant, 409 F.2d 824 (10th Cir. 1969), *aff'd*, 401 U.S. 355 (1971) 8
Sanford v. Robbins, 115 F.2d 435 (5th Cir. 1940), *cert. denied*, 312 U.S. 697 (1941) 8
Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947) 8
Suttles v. Davis, 215 F.2d 760 (10th Cir.), *cert. denied*, 348 U.S. 903 (1954), *rehearing denied*, 385 U.S. 932 (1955) 8
Trop v. Dulles, 356 U.S. 86 (1958) 3, 4, 7, 20
United States v. Alderman, 22 USCMA 298, 46 CMR 298 (1973) 10
United States v. Armbruster, 11 USCMA 596, 29 CMR 412 (1960) 10
United States v. Bennett, 7 USCMA 97, 21 CMR 223 (1956) 17, 18
United States v. Bevilacqua, 18 USCMA 10, 39 CMR 10 (1968) 10
United States v. Braley, 47 CMR 46, 48 n.1 (CGCMR 1973) 10
United States v. Brown, 7 USCMA 251, 22 CMR 41 (1956) 11

Page

United States v. Burney, 6 USCMA 776, 21 CMR 98 (1956) 7, 11
United States v. Care, 18 USCMA 535, 40 CMR 247 (1969) 11
United States v. Crawford, 15 USCMA 31, 35 CMR 3 (1964) 10
United States v. Daniels, 23 USCMA 94, 48 CMR 655 (1974) 10
United States v. Day, 2 USCMA 416, 9 CMR 46 (1953) 17
United States v. Garlich, 15 USCMA 362, 35 CMR 334 (1965) 10
United States v. Gunnels, 8 USCMA 130, 23 CMR 354 (1957) 10
United States v. Kenneth Herrington, CM 432012, Fort Hood, Texas 6
United States ex rel Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944) 8
United States v. Jacoby, 11 USCMA 428, 29 CMR 244 (1960) 9, 11
United States v. Jobe, 10 USCMA 276, 27 CMR 350 (1959) 4
United States v. Manos, 17 USCMA 10, 37 CMR 274 (1967) 10
United States v. O'Brien, 3 USCMA 105, 11 CMR 105 (1953) 17
United States v. Poundstone, 22 USCMA 277, 46 CMR 277 (1973) 10
United States v. Richardson, 21 USCMA 54, 44 CMR 108 (1971) 11
United States v. Ross, 13 USCMA 432, 32 CMR 432 (1963) 10
United States v. Schwarz, 45 CMR 852 (1971) 18
United States v. Billy Dean Smith, CM 429555, Fort Ord, California 6
United States v. Tempia, 16 USCMA 629, 37 CMR 249 (1967) 4, 5, 7, 9, 10
United States v. Walker, 20 CMR 931 (1955) 5
United States v. Wappler, 2 USCMA 393, 9 CMR 23 (1953) 5, 15, 16
United States v. Wilson, 32 U.S. 94, 7 Pet. 150 (1833) . 21
United States v. White, 17 USCMA 211, 38 CMR 9 (1967) 10

Page

Wade v. Hunter, 336 U.S. 684, *rehearing denied*, 337 U.S. 921 (1949) 6
Whelchel v. McDonald, 340 U.S. 122 (1950), *rehearing denied*, 340 U.S. 923 (1951) 7
Wood v. McLucas, 22 USCMA 475, 47 CMR 643 (1973) 5

CONSTITUTION OF THE UNITED STATES:

Article II, Section 2 21

Fourth Amendment 8
Fifth Amendment 6, 7, 8, 11
Sixth Amendment 7, 8, 11
Eighth Amendment 2, 3, 4, 5, 7, 8, 9, 11, 15, 16

STATUTES:

Uniform Code of Military Justice (10 U.S.C. § 801, 940) 2, 3, 5, 13, 15, 20
10 U.S.C. §§ 810, 827, 830, 831, 833, 835, 838, 844, 846, 849, 870 13
10 U.S.C. § 855 .....4, 13, 15
10 U.S.C. § 933 14
10 U.S.C. § 934 .....5, 14
18 U.S.C. § 794(a) 5
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Nationality Act of 1940 § 401(g) 3

MISCELLANEOUS:

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Page

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

I. The Government's Argument That Furman v. Georgia Does Not Invalidate the No-Parole Provision of Petitioner's Commuted Sentence Is Erroneous

In their brief respondents raise a major new constitutional argument. Although they did not do so in their brief or their oral argument at the Court of Appeals or in their opposition to the petition for certiorari, respondents now question, for the first time, the applicability of *Furman* v. *Georgia,* 408 U.S. 238,

rehearing denied, 409 U.S. 902 (1972), to the military. As we read respondents' brief, this is now their principal defense to the argument that the no-parole provision of petitioner's commuted sentence is invalid under *Furman.*

Based as it is on the historical separateness of military jurisprudence, this argument is inextricably related to the larger question of the applicability of the Bill of Rights to the military generally. Because, for this reason, the implications of respondents' newly formulated argument are so far-reaching, and because that argument is squarely contrary to the full body of precedents developed by both civilian and military federal courts over several decades, it is addressed in some detail below.

A. The Eighth Amendment Prohibition Against Cruel and Unusual Punishments Applies With Full Force to the Military.

The government's new contention that the Eighth Amendment prohibition against cruel and unusual punishments, as explicated in *Furman* v. *Georgia,* does not apply to the military is inconsistent with (1) this Court's opinions in *Furman* v. *Georgia* itself, (2) decisions by both military and civilian courts, including this Court, applying the Eighth Amendment prohibition against cruel and unusual punishments to the military, and (3) the body of precedents, civilian and military, applying the principle that the Bill of Rights is applicable to the military except where expressly or necessarily inapplicable. A decision adopting the argument the government here makes would stand in direct contrast to the entire pattern of development of modern military law since the enactment of the Uniform Code of Military Justice in 1950. Moreover, the conclusory grounds on which respondents suggest that this Court take such a step are demonstrably erroneous.

First, respondents' assertion that *Furman* v. *Georgia* is inapplicable to the military is contradicted by the Court's opinion in *Furman* itself. The Court's *per curiam* decision makes no exception for federal statutes that apply to the military. Also, Mr. Justice Stewart lists in his separate opinion four American capital punishment statutes *not* affected by the Court's decision, but does not include in that list the federal statutes affecting the military. 408 U.S. at 307. Even more conclusive, the Court's dissenters specifically note that the Court's holding strikes down death penalty provisions of the Uniform Code of Military Justice. Mr. Justice Powell, with whom the other three dissenters joined, stated that "numerous provisions of . . . the Uniform Code of Military Justice also are voided." 408 U.S. at 417-418.

Second, both civilian and military federal courts have made clear that the Eighth Amendment prohibition against cruel and unusual punishments applies to the military. Conclusive on this point is *Trop* v. *Dulles,* 356 U.S. 86 (1958), in which the Supreme Court applied the Eighth Amendment provision against cruel and unusual punishments to a statute which imposed additional sanctions on servicemen convicted of wartime desertion. At issue was section 401(g) of the Nationality Act of 1940, which provided that persons convicted of desertion during wartime and sentenced to dismissal or discharge would lose their citizenship. Although the Court was divided on whether the statute was penal and whether it was unconstitutionally cruel and unusual, there was no disagreement on the applicability of the Eighth Amendment to the military. Moreover, the Court's ruling was unaffected by the fact that—as respondents allege

is here the case—the punishment was enacted in "response to the needs of the military in maintaining discipline in the armed forces, especially during wartime." *Id.*, at 107 (Brennan, J., concurring). Thus, *Trop* v. *Dulles* is alone dispositive of the government's claim. As numerous other cases indicate, however, it is only a part of the substantial body of law with which the government's new contention is incompatible.

Lower federal civilian courts have also applied the Eighth Amendment cruel and unusual punishments standard to the military in a number of cases. *E.g., Powers* v. *Hunter,* 178 F.2d 141, 145 (10th Cir. 1949), *cert. denied,* 339 U.S. 986, *rehearing denied,* 340 U.S. 847 (1950); *Easley* v. *Hunter,* 209 F.2d 483, 486 (10th Cir. 1953); *Benjamin* v. *Hunter,* 169 F.2d 512 (10th Cir. 1948). *See also* cases holding that activation of delinquent military reservists does not violate Eighth Amendment ban on cruel and unusual punishment, *e.g., Caruso* v. *Toothaker,* 331 F. Supp. 294, 302 (M.D. Pa. 1971); *Mickey* v. *Barclay,* 328 F.Supp. 1108 (E.D. Pa. 1971).

Moreover, military courts, citing both the Eighth Amendment of the Constitution and Article 55 (10 U.S.C. § 855) of the Uniform Code of Military Justice (UCMJ), have followed civilian standards and ruled that the military may not impose cruel and unusual punishments. In *United States* v. *Jobe,* 10 USCMA 276, 279, 27 CMR 350, 353 (1959), the U.S. Court of Military Appeals (USCMA) stated that "a court-martial cannot impose 'cruel or unusual punishment,' " citing Article 55 of the Code, and noted, citing *Trop* v. *Dulles,* that the punishment in question might violate that standard. In 1967 in *United States* v. *Tempia,* 16 USCMA 629, 37 CMR 249 (1967), Judge Kilday, emphasizing the point that constitutional decisions of the Supreme Court are binding on military courts (*see* p. 10, *infra*), noted that federal courts frequently review military decisions through collateral attack. Among the issues so reviewable, he observed, is whether "a sentence was so severe as to offend against the constitutional prohibition against cruel and inhuman punishment." 16 USCMA at 641, 37 CMR at 261 (Kilday, J., concurring). As early as 1955 an Air Force Board of Review ruled in *United States* v. *Walker,* 20 CMR 931, that a particular punishment was "prohibited by the 'cruel and unusual punishment' provisions of both the Constitution of the United States and the Uniform Code of Military Justice." *Id.,* at 935.

Further, although the general disuse of the death penalty in the military has precluded USCMA's considering any death penalty cases since *Furman* v. *Georgia,* USCMA has cited *Furman* in connection with the trial of a serviceman under Article 134, 10 U.S.C. § 934, for a violation of 18 U.S.C. § 794(a), which prior to *Furman* was a capital offense (and therefore not triable under Article 134). Thus, USCMA has directly relied on *Furman* at least to the extent that it has justified expansion of military jurisdiction under Article 134.[1] *Wood* v. *McLucas,* 22 USCMA 475, 47 CMR 643 (1973).

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[1] There would undoubtedly be a greater number of military decisions relying exclusively on the Eighth Amendment were it not for the existence of a roughly parallel prohibition in Article 55 of the UCMJ. Military courts are more inclined to cite Article 55 not only because that obviates the need to rule on a constitutional ground, but because the Article 55 prohibition against cruel and unusual punishment is broader than the Eighth Amendment. United States v. Wappler, 2 USCMA 393, 396, 9 CMR 23, 26 (1953); pp. 15-16, *infra.*

In addition to military appellate court rulings, *Furman* v. *Georgia* has also been applied by military judges, lawyers, and commanders in the field.[2]

Third, civilian and military federal courts, including the United States Supreme Court, have repeatedly made clear that the Bill of Rights is, with narrow exceptions not here relevant, applicable to members of the armed forces. In *Burns* v. *Wilson,* 346 U.S. 137 (1953), which established the prevailing standard for the scope of civilian review, the Court stated that "military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights." *Id.,* at 142. Although the Court issued four separate opinions reflecting differing views on the appropriate scope of review, none quarrelled with the underlying thesis that the constitutional rights at issue applied to the military.

This statement simply reiterated what the Supreme Court had evidenced in previous decisions. In *Wade* v. *Hunter,* 336 U.S. 684, *rehearing denied,* 337 U.S. 921 (1949), for example, the Supreme Court decided whether interruption and re-referral of an Army court-martial in Germany had violated the accused serviceman's Fifth Amendment protection against double jeopardy. Although divided on the merits, the Court was agreed on the implicit premise that the double jeopardy clause of the Fifth Amendment applies to the military. *Id.,* at 690, 692. *See also Trop* v. *Dulles, supra.*

[2] *E.g.,* United States v. Billy Dean Smith, CM 429555, Fort Ord, California (military judge granted defense counsel motion that case be treated as non-capital on grounds that Furman v. Georgia is binding on the military); United States v. Kenneth Herrington, CM 432012, Fort Hood, Texas (on basis of defense counsel brief arguing that Furman v. Georgia prohibited referral as a capital case, convening authority, contrary to pretrial advice from his staff, referred case as non-capital).

All courts, civilian and military, agree that the Fifth Amendment right to indictment by grand jury and the Sixth Amendment right to trial by jury do not apply to the military.[3] In delineating the exceptions, however, the Supreme Court has indicated that they do not include the Eighth Amendment ban on cruel and unusual punishments. In *O'Callahan* v. *Parker,* 395 U.S. 258 (1969), in which the issue was the limits of military subject matter jurisdiction, the Court confirmed the exclusion of the grand jury and petit jury provisions and observed that within the limits of military jurisdiction criminal defendants are deprived of these constitutional rights. Emphasizing the constitutional implications of its ruling, the Court emphasized that "[*t*]*hose civil rights* [grand jury indictment and jury trial] are the constitutional stakes in the present litigation." *Id.,* at 262. The serviceman's Eighth Amendment protection against cruel and unusual punishment, significantly, was not.

Numerous lower federal courts have paralleled and followed Supreme Court and USCMA decisions by applying provisions of the Bill of Rights—except for the Fifth and Sixth Amendment grand jury indictment and jury trial provisions — to citizens in the armed forces. Although courts have sometimes refrained from passing on constitutional questions on

[3] Whelchel v. McDonald, 340 U.S. 122 (1950), *rehearing denied,* 340 U.S. 923 (1951); Reid v. Covert, 354 U.S. 1 (1957); Kahn v. Anderson, 255 U.S. 1 (1921); Ex parte Quirin, 317 U.S. 1 (1942); United States v. Tempia, 16 USCMA 629, 37 CMR 249 (1967); United States v. Burney, 6 USCMA 776, 796, 21 CMR 98, 118 (1956).

grounds of limited scope of review,[4] the body of case law reflecting the applicability of the Bill of Rights to the military is nevertheless substantial. Federal courts have tested the constitutionality of actions by military courts-martial and authorities against numerous provisions of the Bill of Rights. The case law is extensive.[5]

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[4] Lower federal courts have applied a number of varying interpretations of the "fully and fairly" scope of review standard announced in Burns v. Wilson, *supra*. Under some of these variants courts have declined to pass on the merits of constitutional claims. *See generally* H. Moyer, *Justice and the Military*, §§ 6-330 to 6-350 (1972).

[5] Illustrative are Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965) (Fifth Amendment due process, Sixth Amendment right to counsel); Relford v. Commandant, 409 F.2d 824 (10th Cir. 1969), *aff'd*, 401 U.S. 355 (1971) (Fifth Amendment self-incrimination—line up, confession); Kauffman v. Secretary of Air Force, 415 F.2d 991 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970) (Fourth Amendment search, Fifth Amendment self-incrimination); Easley v. Hunter, 209 F.2d 483 (10th Cir. 1953) (Fifth Amendment due process, Sixth Amendment right to confrontation, Eighth Amendment cruel and unusual punishment); United States ex rel. Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944) (Fifth Amendment due process); Sanford v. Robbins, 115 F.2d 435 (5th Cir. 1940), *cert. denied*, 312 U.S. 697 (1941) (Fifth Amendment double jeopardy); Kasey v. Goodwyn, 291 F.2d 174 (4th Cir. 1961), *cert. denied*, 368 U.S. 959 (1962) (Fifth Amendment due process—pretrial publicity); Harris v. Ciccone, 417 F.2d 479 (8th Cir. 1969), *cert. denied*, 397 U.S. 1078 (1970) (Sixth Amendment right to counsel, right to be informed of charges); Burns v. Lovett, 202 F.2d 335 (D.C. Cir. 1952), *aff'd sub nom*, Burns v. Wilson, 346 U.S. 137 (1953) (Fifth and Sixth Amendment rights except for jury provisions); McCurdy v. Zuckert, 359 F.2d 491 (5th Cir.), *cert. denied*, 385 U.S. 903 (1966) (Fifth Amendment due process); Suttles v. Davis, 215 F.2d 760 (10th Cir.), *cert. denied*, 348 U.S. 903 (1954), *rehearing denied*, 385 U.S. 932 (1955) (Fifth Amendment due process); Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947) (Fifth Amendment due process, Sixth Amendment right to counsel—time to prepare); Augenblick v. United States, 377 F.2d 586, 593-96 (Ct. Cl. 1967), *rev'd on other grounds*, 393 U.S. 348 (1969) (Fifth Amendment double jeopardy). The examples could continue.

Even more explicit than federal court precedents is the unambiguous position of the U.S. Court of Military Appeals, which has repeatedly held that the Bill of Rights applies fully to the military except where expressly or by necessary implication inapplicable. Moreover, the Court of Military Appeals, which this Court has described as "the court to which Congress has confided primary responsibility for the supervision of military justice,"[6] has specifically reaffirmed the applicability of the Eighth Amendment ban against cruel and unusual punishment.

The Court of Military Appeals (USCMA) has long embraced the rule that

> "the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces." *United States* v. *Jacoby*, 11 USCMA 428, 430-31, 29 CMR 244, 246-47 (1960).

In *United States* v. *Tempia*, 16 USCMA 629, 37 CMR 249 (1967), the court, citing authorities dating back to 1780, explicitly rejected the contrary contention on which respondents base their present argument:

> "The time is long since past . . . when this Court will lend an attentive ear to the argument that members of the armed services are, by reason of their status, *ipso facto* deprived of all protections of the Bill of Rights." 16 USCMA at 633, 37 CMR at 253.

Focusing directly on the historical separateness which respondents here stress, the court stated:

> "That military law exists and has developed separately from other Federal law does not mean that persons subject thereto are denied their constitutional rights." *Id.*

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[6] Noyd v. Bond, 395 U.S. 683, 695 (1969).

On numerous occasions the Court of Military Appeals has reiterated this principle, and lower military courts have followed it.[7]

Also, USCMA has explicitly stated in numerous decisions that it is bound by Supreme Court rulings on provisions of the Bill of Rights. In *United States* v. *Tempia, supra,* in which it applied *Miranda* v. *Arizona,* 384 U.S. 436, *rehearing denied,* 385 U.S. 890 (1966), to the military, the court stated that

> "As the Chief Judge has noted, the views of the 'Supreme Court of the United States on constitutional issues' are binding on us." *Id.*, at 255.

Similarly, the court reiterated in *United States* v. *White,* 17 USCMA 211, 38 CMR 9 (1967), that "this Court must accept and apply decisions of the Supreme Court of the United States on constitutional questions." 17 USCMA at 216, 38 CMR at 14. Indeed a brief survey of USCMA decisions makes abundantly clear that that tribunal invariably looks to the United States Supreme Court for controlling guidance on constitutional questions.[8]

[7] *E.g.*, United States v. Manos, 17 USCMA 10, 37 CMR 274 (1967); United States v. White, 17 USCMA 211, 38 CMR 9 (1967); United States v. Armbruster, 11 USCMA 596, 598, 29 CMR 412, 414 (1960); United States v. Alderman, 22 USCMA 298, 303, 46 CMR 298, 303 (1973); United States v. Bevilacqua, 18 USCMA 10, 11, 39 CMR 10, 11 (1968); United States v. Crawford, 15 USCMA 31, 34, 35 CMR 3, 6 (1964); United States v. Braley, 47 CMR 46, 48 n.1 (CGCMR 1973).

[8] *See, e.g.*, cases applying Supreme Court standards in the areas of search and seizure (United States v. Poundstone, 22 USCMA 277, 46 CMR 277 (1973); United States v. Garlich, 15 USCMA 362, 35 CMR 334 (1965); United States v. Ross, 13 USCMA 432, 32 CMR 432 (1963)); right to counsel (United States v. Alderman, 22 USCMA 298, 303, 46 CMR 298, 303 (1973); United States v. Gunnels, 8 USCMA 130, 23 CMR 354 (1957)); double jeopardy (United States v. Daniels, 23 USCMA 94, 48 CMR 655 (1974); United States v. Richardson, 21 USCMA 54, 44 CMR 108 (1971)); right of confrontation (United States v. Jacoby, 11 USCMA 428, 29 CMR 244 (1960)); acceptance of guilty pleas (United States v. Care, 18 USCMA 535, 40 CMR 247 (1969)).

In addition, the Court of Military Appeals and other military appellate courts have made clear that the Eighth Amendment prohibition against cruel and unusual punishment is not one of the constitutional exceptions which does not affect the military. To the contrary, as early as 1956 the Court of Military Appeals stated that:

> "Once a person is held to be subject to military law, and is tried by a court-martial, every right and privilege guaranteed to any citizen by the Constitution is granted him by the Uniform Code of Military Justice, with the exception of a trial by jury and a presentment of a grand jury." *United States* v. *Burney,* 6 USCMA 776, 796, 21 CMR 98, 118 (1956).

Later the same year Judge Quinn, who served as Chief Judge of the court for its first 20 years, reiterated this guiding rule, stating that servicemen are "entitled to all the rights and privileges accorded to civilians, except the right to an indictment by a grand jury, which is expressly excluded by the Constitution itself, and trial by jury, which is excluded by necessary implication." *United States* v. *Brown,* 7 USCMA 251, 260, 22 CMR 41, 50 (1956) (Quinn, J., concurring).[9]

[9] Nor may this view be regarded as an alien proposition, for military authorities have themselves long espoused the view that constitutional protections apply to members of the armed forces. In 1920 the Judge Advocate General of the Navy stated that

> " 'all the amendments are applicable to persons in the land and naval forces in letter as well as in spirit, except the sixth amendment, and so much of the fifth amendment as relates to presentment or indictment by a grand jury.' " I Navy De-

Fourth, as the foregoing case law suggests, respondents' argument runs counter to the basic policy that underlies the development of military law over the past several decades. Through the decisions of the Court of Military Appeals and civilian federal courts, the undeviating trend has been toward greater similarity between civilian and military criminal justice systems, toward more rather than less complete protection of constitutional rights. As one prominent commentator and champion of military justice stated in 1961,

> "our policy should not be to maximize [the differences between soldiers and civilians] so far as that can be done without outraging the courts' sense of justice, but rather to minimize them so far as that can be done without impairing military efficiency." Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions,* 61 Colum. L. Rev. 40, 71.

This view and its embodiment in federal court decisions over the past 25 years is consistent with, and has been reinforced by, Congress' express endorsement

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partment, Compilation of Court-Martial Orders for the Years 1916-1937, at 595, 597 (1940); as cited in Wiener, Courts-Martial and the Bill of Rights: the Original Practice II, 72 Harv. L. Rev. 266, 300-01 (1958).

Similarly, in testimony before the Senate Subcommittee on Constitutional Rights in 1962 the Assistant Judge Advocate General of the Army stated:

> "The Department of the Army and the Judge Advocate General believe that the intent of Congress that the protections of the Constitution of the United States extend to the members of the Military Establishment has become a reality. We welcome the opportunity to discuss the constitutional safeguards extending to each of us in the military service." *Hearings on Constitutional Rights of Military Personnel Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 87th Cong., 2d Sess., at 99 (1962).

of the same view. The enactment of the Uniform Code of Military Justice in 1950 was a landmark congressional mandate to increased similarity between military and civilian criminal systems.[10] Numerous provisions of the new Uniform Code paralleled, and in some instances surpassed, prevailing constitutional guarantees.[11] As discussed above, the civilian Court of Military Appeals, also a creation of the UCMJ, has carried out the mandate Congress laid down. Further, since 1950 Congress has twice amended the Code, effecting in each instance changes further reducing the contrasts between civilian and military criminal justice systems.[12] This coalescence of congressional enact-

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[10] *See, e.g.,* F. B. Wiener, *The Uniform Code of Military Justice,* (1950); Morgan, *The Background of the Uniform Code of Military Justice,* 6 Vand. L. Rev. 169 (1953); Ward, *UCMJ—Does It Work?,* 6 Vand. L. Rev. 186 (1953); Sherman, *The Civilianization of Military Law,* 22 Maine L. Rev. 3 (1970); Comment, *The Uniform Code of Military Justice—New Rights and a Means to Enforce Them,* 50 Mich. L. Rev. 1084 (1952); Note, *The Proposed Uniform Code of Military Justice,* 62 Harv. L. Rev. 1377 (1949).

[11] The UCMJ confers upon servicemen the right to a speedy trial (art. 10, 10 U.S.C. § 810, art. 33, 10 U.S.C. § 833), the right to be informed of the charges (art. 10, 10 U.S.C. § 810, art. 35, 10 U.S.C. § 835), right to counsel (art. 27, 10 U.S.C. § 827, art. 38, 10 U.S.C. § 838, art. 70, 10 U.S.C. § 870), right to confront witnesses (art. 30, 10 U.S.C. § 830, art. 46, 10 U.S.C. § 846, art. 49, 10 U.S.C. § 849), protection against double jeopardy (art. 44, 10 U.S.C. § 844), right against self-incrimination (art. 31, 10 U.S.C. § 831), right to obtain witnesses (art. 46, 10 U.S.C. § 846), and protection against cruel and unusual punishments (art. 55, 10 U.S.C. § 855). As construed by USCMA, some of these rights, most notably the right to speedy trial, and the right against self-incrimination, have proved significantly broader than parallel constitutional protections.

[12] *See, e.g.,* Douglass, *The Judicialization of Military Courts,* 22 Hast. L.J. 213 (1971); Mounts & Sugarman, *The Military Justice Act of 1968,* 55 A.B.A.J. 470 (1969).

ments, military court decisions, and civilian court decisions clearly marks the pattern of development of modern military law.[13] In this context, a decision adopting the argument respondents now submit would be an anomalous throwback.

Fifth, respondents' position is not supported by this Court's recent decision in *Parker* v. *Levy,* 42 U.S. L.W. 4979 (June 19, 1974). *Levy,* which is the only case respondents cite in support of their argument on this point, involved the constitutional standards to be applied in judging the requisite specificity of statutes prescribing substantive military offenses. Petitioner in *Levy* challenged, in the face of long-standing precedents to the contrary in the Court of Military Appeals, the constitutionality of articles 133 and 134 of the UCMJ (10 U.S.C. §§ 933, 934), articles which incorporate a minimum of 67 specific offenses. At issue, here, by contrast, is the applicability of a constitutional rule to a single punishment which none of the armed forces has invoked for over a decade, a decade which spans the longest military engagement in our nation's history. As civilian and military courts have repeatedly shown, the one generalized quotation respondents lift from *Levy* has no bearing on the inquiry in case.

Sixth, even casual scrutiny of the factual contentions on which respondents base their suggestion that the rationale of *Furman* is inapplicable to the military

[13] The recent history of military justice has been extensively chronicled. *E.g.,* Quinn, *The United States Court of Military Appeals and Military Due Process,* 35 St. John's L. Rev. 225 (1961); Willis, *The Constitution, The United States Court of Military Appeals and the Future,* 57 Mil. L. Rev. 27 (1972); Sherman, *The Civilianization of Military Law, supra;* Douglass *The Judicialization of Military Courts, supra;* H. Moyer, *Justice and the Military,* §§ 2-103 to 2-108 (1972).

shows them to be wholly baseless. Because servicemen must sometimes carry weapons, serve abroad during wartime, and obey combat orders, respondents argue, the death penalty "may be" more necessary and appropriate than in a civilian setting (Br. 20). Apart from the fact that none of the special factors cited by respondents was present in the case of Schick, this contention is hollow when considered in conjunction with actual military experience. That the maintenance of military discipline requires imposition of the death penalty is belied by the experience of the Army, for the Army has not executed a serviceman in more than a decade, despite extensive combat involvement overseas. The Air Force has executed only two servicemen during its entire history and none under the Uniform Code of Military Justice. And the Navy and Marine Corps have not executed a serviceman since 1849. Indeed, in the Marine Corps, whose tradition of discipline is world renowned, no court-martial has even adjudged a death sentence at the trial level for well over a century. Against these facts, the claim that military discipline is dependent on the death penalty can hardly be taken seriously.

The contention that special military requirements exempt the military from the constitutional ban on cruel and unusual punishments is especially anomalous in light of Article 55 of the UCMJ, 10 U.S.C. § 855, which contains a parallel prohibition. This provision is fully as protective as the Eighth Amendment. In *United States* v. *Wappler,* 2 USCMA 393, 9 CMR 23 (1953), decided just three years after the enactment of the UCMJ, the Court of Military Appeals defined the scope of Article 55:

> "Certainly Congress intended to confer as much protection as that afforded by the Eighth Amend-

> ment. Additionally—at least to the extent of including the punishment involved here—we believe it intended to grant protection covering even wider limits." *Id.*, at 26.

Thus, the proposition now forwarded by respondents is made in the face of a judgment by Congress to the contrary. Indeed, regulations promulgated by the Army itself prohibit the imposition of cruel or unusual punishments.[14]

In addition, respondents assert that the military appellate review process provided by statute prevents "discriminatory or wanton" use of the death penalty (Br. 21). The bald assertion, for which respondents offer no support whatever, is flatly contradicted by fact. Blatant differences among the services themselves are obvious. While the Army executed nearly 150 servicemen during the decade spanning World War II, neither the Marine Corps nor the Navy has executed a single serviceman for over a century and a quarter. Also, contrary to respondents' assertion, imposition of the death penalty in the military has impacted disproportionately against minorities. Of the 12 servicemen executed since 1950, at least 8, and perhaps as many as all 12,[15] were black. Moreover, certain institutional factors unique to the military system of justice increase the likelihood that the death penalty will be applied more irrationally and inconsistently in a military setting than in a civilian one. Judicial processes in

[14] Headquarters, Department of the Army, Army Reg. 190-4, ¶ 2-2(d)(8), at 2-3 (1969).

[15] Both executed members of the Air Force were black. Six of the ten men executed by the Army are known to have been black. Prior to filing this brief, neither counsel for petitioner nor the Army, which furnished its assistance, had been able to identify the race of the remaining four.

the military may, for example, be distorted by the presence or fear of command influence. This possibility is heightened where, as in this case, the victim of the crime is the daughter of a senior Army officer. Conversely, the phenomenon of reverse command influence may favor the accused where, as in the *Calley* case, the accused, like the jury and reviewing authorities, is a commissioned officer. (No commissioned officers were, for example, among the 12 servicemen executed since 1950.) *See generally* H. Moyer, *Justice and the Military* §§ 3-300, 3-301. Military trials may also be under unique pressures where, as in *United States* v. *Day*, 2 USCMA 416, 9 CMR 46 (1953), and *United States* v. *Bennett*, 7 USCMA 97, 21 CMR 223 (1956), the court-martial is convened in a foreign host nation and the victim is a foreign national of that country.

Moreover, the pattern of actual executions in the military conclusively dispels any notion that the military review system ensures rational or systematic use of the death penalty. To select only a few of many possible examples, the appellate filter which respondents cite has approved the execution of an Army private convicted of a single count of murder,[16] but produced a sentence of only 20 years for the murder of five unarmed Vietnamese, one of whom the accused killed by hanging him, cutting his throat with a knife, stabbing him, throwing him into a stream, and detonating grenades on top of him.[17] The same system affirmed the execution of an Army PFC convicted of rape and attempted

[16] United States v. O'Brien, 3 USCMA 105, 11 CMR 105 (1953).

[17] *See* Allen v. VanCantfort, 436 F.2d 625, 627-28 (1st Cir.), *cert. denied*, 402 U.S. 1008 (1971).

murder where the victim lived,[18] but produced a sentence of *one year* in confinement for the murder of several Oriental civilians.[19] The examples could continue.

Finally, there is no basis, in light of the foregoing authority, for respondent's suggestion (Br. 21) that this case be remanded for an evidentiary hearing. Where the government has raised in its brief on the merits a major new constitutional argument not previously made in this case, and where respondents ask this Court to accept their argument over an established body of contrary precedents on grounds that are demonstrably baseless, an evidentiary hearing would serve no purpose. The issues of this case, which has been in litigation for more than three years, do not turn on unresolved questions of fact.

B. The Retrospective Application of Furman v. Georgia Reaches Petitioner's Sentence.

Emphasizing that the *Furman* decision is a product of "changing moral standards" (Br. 22), respondents argue that *Furman* does not justify "reaching back 20 years" to invalidate a commuted death penalty (Br. 23). However, the retrospective application of *Furman* has already had the effect of reaching back a substantial number of years to invalidate prior impositions of the death penalty. For example, application of the rule of *Furman* has invalidated several death penalties imposed in 1960. *See In re Baker,* 267 So.2d 331 (Fla. 1972) (sentences of Simon, Thomas, and Whitney). There is obviously no rational reason to hold that a retroactive constitutional decision goes back 14 years, but not 20.

Commenting on petitioner's argument that the President's action cannot be sustained because it has

[18] United States v. Bennett, 7 USCMA 97, 21 CMR 233 (1956).

[19] United States v. Schwarz, 45 CMR 852 (1971).

the *net effect* of increasing petitioner's sentence above the lawful maximum, respondents state that the flaw in this argument is the assumption that the death penalty was unconstitutional when originally imposed (Br. 25). Respondents misstate petitioner's argument, however, for petitioner nowhere contends that the death penalty was unconstitutional when adjudged. Rather, the argument is that, viewed in light of the retrospective application of *Furman,* the present net effect of the sentence to death and the President's commutation is to leave petitioner with a sentence greater than what has since been held, retroactively, to be the maximum lawful punishment. It is the synthesis of these various circumstances as seen in retrospect, not an assertion that President Eisenhower's action was illegal at the time he acted, which compels the conclusion that the continued imposition of a sentence above the lawful maximum cannot be sustained.

II. The President Exceeded His Constitutional Power to Commute Because the Commuted Punishment Was Not Provided by Statute.

Petitioner has argued that under prior decisions of this Court the President is without authority to commute to a novel punishment not authorized by the legislature, and with this general proposition respondents appear not to take issue.[20] Respondents argue, however, that the punishment of no-parole life imprisonment has the requisite legislative basis. When the bases for this contention are examined, however, it becomes clear that the commuted punishment at issue here is precisely the type of extra-statutory punishment that this Court's precedents prohibit.

[20] Respondents state in their brief: "It may be, moreover, that the President cannot create novel or bizarre punishments, wholly alien to our law." (Br. 12.)

Petitioner's sentence was commuted to a punishment that was not provided by law for the punishment of *any* offense proscribed by the Uniform Code of Military Justice. Moreover, the punishment was to be found nowhere in the United States Code. In short, it was at the time a punishment completely unknown to federal law, both military and civilian. Respondents nonetheless argue that this punishment was not new, pointing to the pre-1910 absence of a parole statute, state statutes, and 21 U.S.C. 848(a), (c). None of these examples supports respondents. Reference to punishments permitted at various times in our country's past is obviously inapposite; surely respondents would not contend that commutation to denationalization would be permissible because it was "known to the law" prior to *Trop* v. *Dulles, supra.* Likewise, punishments prescribed by state codes, most of which petitioner was never subject to, are no more relevant to his case than are criminal codes of foreign countries. And reference to 21 U.S.C. 848(a), (c) is clearly irrelevant, for that provision was not in existence at the time petitioner was sentenced or at the time the President commuted his sentence. Indeed, that provision was enacted in 1970, some ten years *after* the President's commutation. Finally, respondents' argument that no-parole life is not unprecedented because many prisoners die in prison before their terms expire is, we submit, frivolous.

Apart from the foregoing, most of respondents' argument is made against a point that petitioner does not assert, namely, that the President can commute only to a lesser punishment provided by statute *for the offense of which the accused was convicted.* Using this as a point of departure, respondents then argue that

the limits petitioner urges would unacceptably restrict the President's power where an accused is convicted of an offense for which the prescribed punishment is a specified range of years or mandatory death. Petitioner has not, however, argued that the President would be so fettered,[21] and this result need not follow from the limitation implied by previous decisions of this Court.

Ex parte Wells, 59 U.S. (18 How.) 307, 313 (1855), states that the King[22] could not commute to an alternative lesser punishment unless that punishment was "provided by legislation." This limitation might be construed in two ways: that the chief executive could substitute only lesser punishments provided by legislation for the particular offense committed, or that he could commute only to those types of punishments that the legislature had authorized generally as criminal punishments. Although applicable precedent could be read, as respondents have assumed in their brief, to impose the former, more restrictive limitation, even this would not necessarily bar simple commutation to lesser terms of confinement in the hypotheticals respondents cite.[23] This limitation could be read, we

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[21] *Cf., e.g.,* petitioner's argument that relevant authority requires that the lesser punishment must be "authorized by law" (Pet. Br. 2), known "to the criminal code" (Pet. Br. 24), "not . . . foreign to the system of criminal law under which the prisoner was tried" (Pet. Br. 25), within "the statutory framework" (Pet. Br. 26), and must have "some statutory basis" (Pet. Br. 32).

[22] The executive clemency power in Article II, Section 2 of the Constitution was taken from English practice and incorporated English principles and rules concerning the exercise of that power. United States v. Wilson, 32 U.S. 94, 101-02, 7 Pet. 150, 160 (1833); Ex parte Wells, 59 U.S. (18 How.) 307, 312-13 (1855).

[23] Respondents cite Biddle v. Perovich, 274 U.S. 480 (1927), in support of their position. However, in that case, in which the Court ruled that a substitute punishment must be authorized by

submit, to permit the President to commute sentences of death and imprisonment to a lesser term of imprisonment, the punishment that has been central to our jurisprudence throughout our history and which has continually been legislatively sanctioned. What this limitation would prohibit, however, is the President's commuting to some other, specialized punishment prescribed only for a particular or specific type of offense.

The facts of this case, however, do not require the Court to decide whether statutory authority must be found within the statute proscribing the offense. The precedents petitioner has previously cited clearly proscribe imposition of a punishment not prescribed for *any* offense in the criminal code. This case involves just such a non-statutory punishment and can therefore be decided on this narrower ground.

CONCLUSION

For the foregoing reasons and the reasons stated in the Brief for the Petitioner, the no-parole portion of petitioner's commuted sentence should be declared invalid.

Respectfully submitted,

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law, the Solicitor General made precisely the same argument petitioner here makes: that the validity of the substituted punishment depends on its "being one authorized and provided by law as opposed to one invented or devised by the pardoning power." Brief for the Warden, p. 37.

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No. 73-5677

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Pet's Reply ~~SUPPLEMENTAL~~ BRIEF

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SUPPLEMENTAL BRIEF

The Supreme Court of California, sitting en banc, has just ruled that a no-parole condition attached to the commutation of a death sentence to life imprisonment is invalid under case law holding capital punishment to be unconstitutional. This California decision, In re Walker Crim. No. 16711 (Cal., Feb. 14, 1974), involves precisely the same issue as does this case. Its conclusion is directly contrary to the decision in the Court of Appeals below and confirms that this case presents a substantial constitutional issue that will undoubtedly arise in other states.

The facts of Walker and this case are virtually indistinguishable. Both Schick and Walker were charged with first degree murder. Like Schick, Walker entered a plea of not guilty by reason of insanity, and, like Schick, he was found to have been sane at the time of the offense, found guilty, and sentenced to death. In 1961 the governor commuted his death sentence to life imprisonment without

possibility of parole, the same form of clemency as that exercised by President Eisenhower in Schick's case. In 1972, Walker challenged his conviction collaterally, and in 1974, on appeal from a decision of the Solano County Superior Court, the California Supreme Court considered, inter alia, whether Walker's conditionally commuted sentence was affected by People v. Anderson, 6 Cal. 3d 628 (1972), the California decision that retroactively held capital punishment to be unconstitutional.

The court in Walker first observed that the only punishments provided for first degree murder under the California Penal Code were life imprisonment or death, which are the same alternatives provided by the Uniform Code of Military Justice under which Schick was sentenced. While rejecting the argument that the combined effect of Anderson and the governor's commutation was to increase the severity of petitioner's punishment, the court nevertheless held that the no-parole condition attached to the commutation was constitutionally invalid. Since the Anderson decision invalidating the death penalty is "'fully retroactive,'" any first degree murderer subject to a sentence greater than life imprisonment for that offense is entitled to have his sentence modified. To hold otherwise, the court ruled, would discriminate inequitably against those prisoners sentenced to death who had been subject to clemency in the form of commutation to life imprisonment without possibility of parole.

> It manifestly would be inequitable to hold that, although murderers now under sentences of death may have their sentences reduced to life imprisonment (which is with possibility of parole (see penal code Section 3046)) murderers such as petitioner whose death

> sentences have been commuted to life imprisonment without possibility of parole are not entitled to have that restriction removed from their life sentences [emphasis in the original].
>
> Pp. 40-41, slip opinion.[1/]

Comparing prisoners in Walker's situation with prisoners whose death sentences had not been commuted, the court continued:

> The two groups are identical except that prisoners in the latter group have had their sentences commuted, not unlikely as a result of circumstances in mitigation of the offense. And no considerations have led us to conclude that such inequities should be permitted.
>
> Id., at 41.

In addition, at page 40 of its slip opinion the Supreme Court of California expressly rejected the argument that petitioner is entitled to no relief because he is no longer under a sentence of death, the argument upon which the Solicitor General's Memorandum in Opposition places primary reliance. The court also rejected the novel suggestion, implicit in the Solicitor General's Memorandum, that under Furman previously imposed death penalties shall be retroactively void for some purposes (viz., the carrying out of such sentences) but not others (viz., providing the basis for imposing commuted sentences not provided by law).

It should further be noted that the only two cases cited in support of the legality of commuting to a sentence not provided by statute furnish doubtful support for that proposition. In both cases, Ex parte Harlan, 180 Fed. 119 (C.C.N.D. Fla. 1909), and Stroud v. Johnson, 139 F.2d 171 (9th Cir. 1943), the relevant language is dicta. And both decisions cite as their only authority Ex parte Wells, 59 U.S. (1855), which, as the Petition for Certiorari

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1/ The Solicitor General states in his Memorandum in Opposition that he has filed a copy of the slip opinion with the Clerk.

discusses, did not involve conditional commutation. Moreover, Ex parte Harlan, supra, itself involved not commutation, but mitigation, and even that clemency action had not been officially granted.[2/]

Finally, defendant's argument that commutation to life imprisonment without possibility of parole is not unlawful is not supported by the assertion that "[t]he no-parole condition is clearly one known to law." Memo. in Opp. at 4. The no-parole condition is not, and never has been, provided by statute for first degree murder, either under civilian federal law or the Uniform Code of Military Law. Nor has a no-parole condition ever been sanctioned in conjunction with life imprisonment. Further, those few situations in which no-parole conditions have been sanctioned have involved prior consideration and explicit approval by the legislature.

For these reasons and the reasons stated in the Petition for Certiorari, the Petition should be granted.

Respectfully submitted,

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2/ Other early instances of imprecise use of the term "commutation" and the confusion that has resulted are discussed in the Petition in footnotes 7 and 8 and at pp. 15-18.